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IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF COLUMBIA

Filed May 27, 1953

No. 68-53

UNITED STATES OF AMERICA EX REL. AUDREY M. TOTH,
Appellant,

VERSUS

HAROLD E. TALBOTT, Secretary of the Air Force, *Appellee.*

Rule for Petition for Writ of Habeas Corpus

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA:

The Relator, Audrey M. Toth, above-named, respectfully represents:

1. That she is the sister of Robert W. Toth and resides at 210 Dunseith Street, Pittsburgh, Pennsylvania.

2. That Robert W. Toth is now illegally under arrest, restraint, detained and deprived of his liberty by the above-named Respondent in a stockade at Taegu, Korea.

3. That said unlawful arrest, restraint and detention of the said Robert W. Toth by Respondent purports, as Relator is informed and believes, to be under and pursuant to Article 3(a) of the Uniform Code of Military Justice, effective 31 May, 1951.

4. That the Respondent alleges that on the night of September 27, 1952, premeditated murder, conspiracy to commit murder, and aggrevated assault were committed against th person of one Bang Swoon Kil, a citizen of South Korea, and that the said Robert W. Toth may have been involved in the commission of the aforesaid offenses. Since his seizure and arrest, the said Robert W. Toth has declared in writing that he is not guilty of committing the said crimes.

5. That the said Robert W. Toth was honorably discharged from the Air Force of the United States of America

on December 8, 1952, having theretofore been awarded the Bronz Star for bravery beyond the call of duty.

77 6. That subsequent to his discharge from the Air Force, the said Robert W. Toth became gainfully employed as a steel-worker in the City of Pittsburgh, Pennsylvania, and was so employed on May 13, 1953, at which time he was secretly arrested by military authorities and spirited away by airplane to Korea to face possible trial on the afore-mentioned charges.

7. That the aforesaid seizure, arrest and abduction of the said Robert W. Toth was in violation of the rights guaranteed to him by the Fourth and Fifth Amendments of the Constitution of the United States of Aemrica, in that he was deprived of "due process of law" and of other fundamental rights inherent in our American system of government.

8. That being a civilian and entitled to the legal rights of a person in that status, the said seizure and arrest of the said Robert M. Toth was in violation of Rule 5 and Rule 40 of the Federal Rules of Criminal Procedure, in that the arresting officers failed to obey the following mandatory requirements thereof:

a. The person making an arrest with or without a warrant is required to take the person before the nearest available Commissioner or before any other nearby officer in power to commit persons charged with offenses against the laws of the United States. (The place where the said Robert W. Toth was seized and apprehended is almost within walking distance of the District Court for the Western District of Pennsylvania, and two United States Commissioners with offices in the same building.)

b. In failing to file a complaint before either of the said United States Commissioners or any of the local District Judges.

c. In failing to have a Commissioner inform the defendant of the complaint, if any there was, against him.

d. In failing to have a Commissioner inform the defendand of his right to retain counsel.

4. In failing to have a Commissioner inform the
78 defendant of his right to have a preliminary examination or hearing.

f. In failing to have a Commissioner inform the said Robert W. Toth that he was not required to make a statement and that any statement made by him could be used against him.

g. In failing to allow the said Robert W. Toth the opportunity to consult counsel, or to even telephone counsel that he was being forcefully taken out of the jurisdiction.

9. That the constitutional rights of the said Robert W. Toth were further violated by the failure of the arresting officers to comply with the procedure set forth in Rule 40 of the Federal Rules of Criminal Procedure. Said Rule was specifically intended to prevent the kidnapping or removal of a defendant out of the jurisdiction in which he resides without a preliminary hearing.

10. That in seizing and arresting the said Robert W. Toth in the manner aforesaid, the Respondent failed to comply with Rule 40 (2) in that neither a Commissioner nor a Judge informed the defendant of the charge or charges against him, of his right to retain counsel, and of his right to have a hearing or to waive a hearing by signing a waiver before a Commissioner or Judge. The requirements outlined in Rule 40 (a), (b), (1), (2), (3), and (4) were in existence and on the statute books when the Uniform Code of Military Justice was passed in 1951, and consequently the remedies afforded to civilians by virtue of such rules were known to framers of the Code and were not repealed by it, expressly or by implication.

11. That the protection afforded by Rules 5 and 40 as aforesaid was a codification of previous decisions of the United States Supreme Court and spelled out the requisites that must be present if due process of law is to be afforded citizens answerable to the criminal laws of the United States.

12. That the said Uniform Code of Military Justice
79 of 1951, as applied to persons not on active duty in the military service (herein referred to as "civil-

(92)

15

CHARGE SHEET

PLACE Hq., 75th Air Depot Wing, APO 970, c/o Postmaster, San Francisco, California		DATE 8 April 1953
ACCUSED (Last name, First name, Middle initial) (List aliases when material.) [redacted], Robert W.	SERVICE NUMBER AF 13 313 080	RANK OR GRADE Civilian, formerly Airman First Class
ORGANIZATION AND ARMED FORCE (If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law.) 220 Dunseith Street Pittsburgh, Pennsylvania A civilian subject to the Uniform Code of Military Justice under Article 3a.	DATE OF BIRTH CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE (MCM, 126h (2))	PAY PER MONTH BASIC $ SEA OR FOREIGN DUTY $ TOTAL $

RECORD OF SERVICE

INITIAL DATE OF CURRENT SERVICE	TERM OF CURRENT SERVICE
Honorably Discharged 8 December 1952	

PRIOR SERVICE (As to each prior period of service, give inclusive dates of service and organization in which serving at termination.)

DATA AS TO WITNESSES

NAME OF WITNESS	ADDRESS	WITNESSES FOR PROSECUTION	WITNESSES FOR ACCUSED
Edward G. Pumphrey, 1st Lt AO 2 215 516	2nd Material Recovery Squadron, K-2 APO 970	X	
Raymond F. Middleman, M/Sgt AF 13 125 060	543d Ammunition Supply Squadron Depot, 75th Air Depot Wing, APO 970	X	
Eugene L. Rumpff, 3/Sgt AF 27 892 864	543d Ammunition Supply Squadron Depot, 75th Air Depot Wing, APO 970	X	
Rodolfo Renteria, Jr., A/2C AF 19 385 999	543d Ammunition Supply Squadron Depot 75th Air Depot Wing, APO 970	X	
Frank R. Zappulla, A/3C AF 11 211 729	3450 Technical Training Wing Francis E. Warren AFB, Wyo.	X	
Pyun Dong Il, Dr.	ROK 1050, Wae Dong, Pusan	X	
Eddie L. Mullins, A/2C AF 18 313 828	3320th Air Police Sq, Amarillo AFB, Texas	X	
Kenneth G. Stoops, A/B AF 15 296 995	3301st Medical Group, Barksdale AFB, La.	X	
[illegible]	[illegible]	X	

Raymond F. Middleman, M/Sgt AF 13 125 060	543d Ammunition Supply Squadron Depot, 75th Air Depot Wing, APO 970	X	
Eugene L. Rumpff, 3/Sgt AF 27 892 864	543d Ammunition Supply Squadron Depot, 75th Air Depot Wing, APO 970	X	
Rodolfo Renteria, Jr., A/2C AF 19 385 999	543d Ammunition Supply Squadron Depot 75th Air Depot Wing, APO 970	X	
Frank R. Zappulla, A/3C AF 11 211 729	3450 Technical Training Wing Francis E. Warren AFB, Wyo.	X	
Pyun Dong Il, Dr.	ROK 1050, Wae Dong, Pusan	X	
Eddie L. Mullins, A/2C AF 18 313 828	3320th Air Police Sq, Amarillo AFB, Texas	X	
Kenneth G. Stoops, A/B AF 15 296 995	3301st Medical Group, Barksdale AFB, La.	X	
William F. Marolock, A/2C AF 14 376 109	1100th Air Police Sq, Bolling AFB, Wash 25, D.C.	X	

DOCUMENTS AND OBJECTS

LIST AND DESCRIBE. IF NOT ATTACHED TO CHARGES, NOTE WHERE IT MAY BE FOUND.

Photographs of Korean male, Bae Seom Kil. OSI (IG) Hq USAF, Wash D.C.

Death Certificate of Bae Seom Kil, Korean male. Retained at District Office #8, OSI (IG) FEAF, APO 970.

DATA AS TO RESTRAINT

NATURE OF ANY RESTRAINT OF ACCUSED	DATE	LOCATION
None		

ians''), and particularly Section 3(a) thereof, is unconstitutional, being contrary to the Fourth and Fifth Amendments of the Constitution of the United States, and other fundamental rights traditionally recognized since the Constitution of the United States with its Amendments was originally drafted.

13. That the said Act, particularly Section 3(a) thereof, is vague, indefinite, arbitrary, capricious and sets up no procedural standards for a fair and impartial hearing to a defendant, all of which is contrary to the due process clause of the United States Constitution.

14. That the unprecedented action of the Respondent in seizing and abducting the said Robert W. Toth, through the Military Police at the Greater Pittsburgh Airport, is without precedent in the annuals of military justice.

15. That to allow a military tribunal to try a civilian for offenses allegedly committed prior to his discharge from the armed forces would thereby vest in military personnel the statutory right to put civilians on trial for their life and liberty, all of which in the past has led to military tyranny and has been declared unconstitutional and in violation of the due process clause of the United States Constitution.

16. That even assuming the validity of the Code of Military Justice, your Relator is advised and therefore avers that there is no justification for secret arrest and seizure, and such action on the part of governmental officials has never been condoned by your Honorable Court.

17. That if the said Act of 1951, particularly Section 3(a) thereof and other sections relating to civilians is declared constitutional, it would provide a military tribunal with continuing jurisdiction in violation of the constitutional and natural rights of the citizens of the United States.

18. Your Relator believes it is proper to say that the afore-described seizure and arrest of the said Robert W. Toth was strikingly similar to the operations of the
80 secret police in those unfortunate countries where civilians are taken away by night never to return

or to be heard from again. The power of the military authorities over some 19,000,000 veterans will be supreme and avove the civil law if the judicial branch of this government permits them the constitutional right to exercise jurisdiction over discharged ex-servicemen.

19. Your Relator is advised and therefore avers that there is no jurisdiction to try by a military Courts-martial the said Robert W. Toth in South Korea, and the Respondent is without any jurisdiction to try the said Robert W. Toth for any offense committed prior to December 8, 1952.

20. Your Relator is advised and therefore avers that a person discharged from the Air Force before a commencement of a Court-martial prosecution against him cannot thereafter be tried before the Courts-martial for crimes committed while he was in active service.

21. That the proposed Courts-martial is without jurisdiction to try him for the reason that at the time of his seizure and arrest he was not a member of the armed forces on active duty.

22. That jurisdiction, if ever acquired, is now void because the said Robert W. Toth has been deprived of his constitutional rights to due process of law.

23. Your Relator is advised and therefore avers that a person separated from the armed services ceases to be amenable to military jurisdiction.

24. That said Article 3(a) is so vague and indefinite that it is insufficiently precise to endow it with the force of law.

25. Your Relator is advised and avers that if any of the aforementioned violations were committed by the said Robert W. Toth, the Republic of South Korea has sole jurisdiction to try him for the said offenses.

81 WHEREFORE, your Relator prays your Honorable Court that a Rule be granted upon Harold E. Talbott, Secretary of the Air Force, Department of National Defense, to show cause, if any he has, why the said Robert W. Toth should not be released and discharged from his present detention and returned to this country for the pur-

pose of according him such constitutional rights as are guaranteed by the United States Constitution. All proceedings including pre-trial investigation of Charges and Specifications, if any have been filed, and the Courts-martial trial itself to be stayed pending disposition of this Rule.

/s/ AUDREY M. TOTH

/s/ ANTHONY R. MCGRATH
2404 Grant Bldg.
Pittsburgh 19, Pa.

/s/ AL. PHILIP KANE
Kane & Koons
1331 G St., N. W.
Washington 5, D. C.
Attorneys for Petitioner

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82 AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF ALLEGHENY, } ss:

Before me, the undersigned authority, personally appeared AUDREY M. TOTH, who being duly sworn according to law, deposes and says that she is the petitioner in the foregoing Petition; that she is authorized to and does make this Affidavit; that all the facts herein stated of her own knowledge are true and the facts stated upon information received from others, she believes to be true, and all of them she expects to be able to prove at the trial of this cause.

/s/ AUDREY M. TOTH

Sworn to and subscribed before me
this 25th day of May, 1953.
/s/ JAMES F. SMITH

83 [Filed May 27, 1953 Harry M. Hull, Clerk]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner,*

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent.*

Order Directing Respondent to Show Cause

It is this 27th day of May, 1953, ORDERED that the petition be filed without prepayment of costs.

IT IS FURTHER ORDERED that the respondent either in person or by counsel appear in the Court on or before the Tenth day after service of a copy of this order and of the petition upon him and make return to said petition and show cause, if any he has why the Writ of Habeas Corpus should not issue.

IT IS FURTHER ORDERED that the respondent serve on the petitioner by mail a copy of his answer to this rule.

/s/ JAS. W. MORRIS
Judge

84 Filed June 4, 1953

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner,*

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent.*

Return and Answer to Rule to Show Cause

Comes now the respondent, Harold E. Talbott, Secretary of the Air Force, upon whom has been served an

order to show cause why a writ of *habeas corpus* should not issue for the production of Robert W. Toth, and by his attorney, Leo A. Rover, United States Attorney in and for the District of Columbia, makes the following return to the said order and respectfully shows that he holds the said Robert W. Toth by authority of the United States as a person subject to military jurisdiction and amenable to trial by court-martial under Article 3(a) of the Uniform Code of Military Justice (50 U. S. C. 553(a)) under the following circumstances:

I

That on April 8, 1953 an officer of the 75th Air Depot Wing, Far East Air Logistic Force, signed court-martial charges, under oath, charging the said Robert W. Toth with the premeditated murder of a male Korean national on or about September 27, 1952, in violation of Article 118 of the Uniform Code of Military Justice (50 U. S. C. 712), and with conspiracy to commit murder on or about September 27, 1952, in violation of Article 81 of the Uniform Code of Military Justice (50 U. S. C. 675). That on or about September 27, 1952, the said Robert W. Toth was an Airman First Class, United States Air Force, assigned to
the 543d Aviation Squadron Supply Depot, 75th
85 Air Depot Wing, APO 970. That the said Robert
W. Toth was honorably discharged from the United States Air Force on December 8, 1952. An authenticated copy of the original court-martial charges is appended hereto.

II

That on April 30, 1953, in accordance with Article 3(a) of the Uniform Code of Military Justice (50 U. S. C. 553(a)) and paragraph 11b of the Manual for Courts-Martial, United States, 1951 (16 FR 1308) the Acting Secretary of the Air Force consented to the apprehension, return to Korea, and trial by court-martial of the said Robert W. Toth, and directed the Air Provost Marshal, United States Air Force, to effect the apprehension of the said Robert

W. Toth and cause him to be delivered forthwith to the Commanding General, Fifth Air Force: That accordingly, on May 13, 1953, at Pittsburgh, Pennsylvania the said Robert W. Toth was lawfully apprehended pursuant to Article 7(b) of the Uniform Code of Military Justice (50 U. S. C. 561(b)). That on May 18, 1953, the said Robert W. Toth was delivered to the Commanding General, Fifth Air Force, an overseas command of the United States Air Force, and is now confined in the Air Force Correction Center, Republic of Korea. An authenticated copy of the original letter of the Acting Secretary of the Air Force, dated April 30, 1953, is appended hereto.

III

That the offenses allegedly committed by the said Robert W. Toth were thoroughly investigated by the United States Air Force prior to the apprehension of the said Robert W. Toth. That the disposition of the charges against the said Robert W. Toth is and will be in all respects pursuant to military law. That a thorough and impartial investigation will be conducted in the presence of the said
86 Robert W. Toth in accordance with the provisions of Article 32 of the Uniform Code of Military Justice (50 U. S. C. 603), and paragraph 34 of the Manual for Courts-Martial, United States, 1951 (16 FR 1316) before any final determination as to the disposition of the charges will be made by the officer exercising court-martial jurisdiction. That the said Robert W. Toth will be advised of his right to be represented at such investigation by counsel. That upon his request he will be represented at the investigation by civilian counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction. That at such investigation the said Robert W. Toth will be afforded full opportunitly to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the officer appointed to conduct such investiga-

tion will examine available witnesses requested by the said Robert W. Toth. That upon completion of such investigation a copy of a statement of the substance of the testimony taken on both sides will be furnished the said Robert W. Toth.

IV

That after completion of the investigation in accordance with the provisions of Article 32 of the Uniform Code of Military Justice (50 U. S. C. 603), and paragraph 34 of the Manual for Courts-Martial, United States, 1951 (16 FR 1316), the officer exercising general court-martial jurisdiction will refer the charges to his staff judge advocate for consideration and advice. That in accordance with the provisions of Article 34 of the Uniform Code of Military Justice (50 U. S. C. 605), the officer exercising general court-martial jurisdiction will not refer the charges to a court-martial for trial unless he has found that the charges are warranted by the evidence indicated in the report of investigation.

87

V

That in the event the charges are referred to a court-martial for trial, the said Robert W. Toth will be represented, in accordance with Article 38 of the Uniform Code of Military Justice (50 U. S. C. 613), by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction. That in the event the said Robert W. Toth chooses to be represented by counsel appointed by the officer exercising general court-martial jurisdiction, such counsel, in accordance with Article 27, Uniform Code of Military Justice (50 U. S. C. 591), as implemented by the policy of the United States Air Force, must be a member of the bar of a Federal court or of the highest court of a State, and must be certified as competent to perform duties as defense counsel by The Judge Advocate General of the United States Air Force.

VI

That in the event the said Robert W. Toth is found guilty and sentenced by a court-martial, the record of trial will be reviewed as required by the provisions of Part IX of the Uniform Code of Military Justice (50 U. S. C. 646-663).

VII

That on March 11, 1953 the said Robert W. Toth voluntarily accompanied an agent of the Office of Special Investigations of the United States Air Force to the agent's Pittsburgh Detachment Office. That at such office the agent read and explained to the said Robert W. Toth his
88 right under Article 31(b) of the Uniform Code of Military Justice (50 U. S. C. 602(b)) not to make any statement concerning the offenses being investigated, and advised him that any statement made by him could be used as evidence against him in a trial by court-martial. That the said Robert W. Toth was also informed of the nature of the matter being investigated. That after the said Robert W. Toth had been so advised he stated that he had knowledge of the matter under investigation; that he refused to answer any other questions and gave as his reason therefor that by answering he might incriminate himself. That the said Robert W. Toth further stated that the matter under investigation had occurred while he was in the military service and that since he is now a civilian he does not wish to revive it. That the said Robert W. Toth also stated that as far as he is concerned it was a past issue and that he had forgotten it.

VIII

That the apprehension of the said Robert W. Toth is lawful under the provisions of Articles 3(a) and 7(b) of the Uniform Code of Military Justice (50 U. S. C. 553(a) and 561(b)); that the offenses which he is charged with having committed while in a status in which he was subject to the Uniform Code of Military Justice (50 U. S. C. 551-

741) are each punishable by confinement of five years or more; that he cannot be tried for such offenses in the courts of the United States or any State or Territory thereof or of the District of Columbia. That the procedures in the courts of the United States and before United States Commissioners in criminal proceedings do not apply in this case. That sole court-martial jurisdiction exists over the said Robert W. Toth to try him for the offenses involved in this case. That court-martial jurisdiction over the said Robert W. Toth now exists in this case notwithstanding his discharge or separation from a military status.
89 That this case presents no constitutional question.

IX

That the said Robert W. Toth cannot be tried for the offenses involved in this case by the Republic of Korea.

X

That by *habeas corpus* the civil courts may exercise no supervisory or correcting power over the proceedings of a court-martial. That the single inquiry, the test, is jurisdiction. That a resort to *habeas corpus* prior to the exhaustion of the remedies provided by Part IX of the Uniform Code of Military Justice (50 U. S. C. 646-663) is inappropriate and premature.

XI

Respondent denies each and every allegation contained in the petition for a writ of *habeas corpus*, except the allegations contained in paragraph one thereof, and except as are hereinbefore specifically admitted, modified, or explained.

(93) 16

Charge I: Violation of the Uniform Code of Military Justice, Article 118

Specification: In that Robert W. Toth, a civilian subject to the Uniform Code of Military Justice under Article 3a, then an Airman First Class, United States Air Force, assigned to the 543d Ammunition Supply Squadron Depot, 75th Air Depot Wing, APO 970, did, at or near K-9 Air Base, APO 970, on or about 27 September 1952, with premeditation, murder Bang Soon Kil, a male Korean national, by means of shooting him with a rifle.

Charge II: Violation of the Uniform Code of Military Justice, Article 81

Specification: In that Robert W. Toth, a civilian subject to the Uniform Code of Military Justice under Article 3a, then an Airman First Class, United States Air Force, assigned to the 543d Ammunition Supply Squadron Depot, 75th Air Depot Wing, APO 970, did, at or near K-9 Air Base, APO 970, on or about 27 September 1952, conspire with First Lieutenant (then Second Lieutenant) George C. Schreiber, Staff Sergeant Kenneth A. Borchardt and Airman First Class Thomas L. Kinder, to commit an offense under the Uniform Code of Military Justice, to wit: premeditated murder of Bang Soon Kil, a male Korean national, and in order to effect the object of the conspiracy, Airman First Class Thomas L. Kinder did shoot the said Bang Soon Kil with a rifle.

If this space is insufficient for all charges and specifications, they will be set forth numerically, front to back, on separate sheets attached to this page.

SIGNATURE OF ACCUSER	RANK	ORGANIZATION
Herman E. Hurst HERMAN E. HURST	Colonel, USAF	Hq 75th Air Depot Wing

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 8th day of April, 1953, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

Ben Taylor
BEN TAYLOR
SIGNATURE

Lt Colonel, USAF, Hq 75th Air Depot Wing
RANK AND ORGANIZATION OF OFFICER ADMINISTERING OATH

Adjutant
OFFICIAL CHARACTER, AS ADJUTANT, SUMMARY COURT, ETC. SEE PARAGRAPH 29e, MCM, 1951, AND ARTICLES 30a AND 136.

Officer administering oath must be a commissioned officer.

_____ DATE

I have this date informed the accused of the charges against him.

_____ SIGNATURE

_____ RANK AND ORGANIZATION

Headquarters, 75th Air Depot Wing, APO 970, c/o PM, San Francisco, Calif, 8 April 1953
DESIGNATION OF COMMAND OF OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION — PLACE — DATE

The sworn charges above were received at 1630 hours, this date.

FOR THE COMMANDING [1] OFFICER:

Ben Taylor
Ben Taylor, Lt Col, USAF, Adjutant
SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

1ST INDORSEMENT

I have this date informed the accused of the charges against him.

_____ SIGNATURE

_____ RANK AND ORGANIZATION

Headquarters, 75th Air Depot Wing, APO 970, c/o PM, San Francisco, Calif, 8 April 1953
DESIGNATION OF COMMAND OF OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION — PLACE — DATE

The sworn charges above were received at 1630 hours, this date.

FOR THE COMMANDING [1] OFFICER:

Ben Taylor
Ben Taylor, Lt Col, USAF, Adjutant
SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

1ST INDORSEMENT

_____ DESIGNATION OF COMMAND OF CONVENING AUTHORITY — PLACE — DATE

Referred for trial to the _____ court-martial appointed by _____

_____, _____ 19__, subject to the following instructions: [2] _____

BY [1] _____ of _____
COMMAND OR ORDER

_____
SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

I have served a copy hereof on each of the above-named accused, this _____ day of _____, 19__.

_____ SIGNATURE

_____ RANK AND ORGANIZATION OF TRIAL COUNSEL

[1] When an appropriate commander signs personally, inapplicable words are stricken out. [2] Relative to proper instructions which may be included in the indorsement of reference for trial, see par. 33j(1), MCM, 1951. If none, so state.

to the code and for which he cannot be tried in the Courts of the United States or any State or Territory thereof or the District of Columbia; court-martial jurisdiction of the United States Air Force having not terminated under Article 3(a) of the Uniform Code of Military Justice; 50 U. S. C. Section 553(a); by the discharge of the said Robert W. Toth on 8 December 1952, I am satisfied that there is probable cause to believe that murder and conspiracy to commit murder was committed as alleged.

97 2. Pursuant to paragraph 11b, Manual for Courts-Martial, 1951, (Executive Order 10214, February 8, 1951), Article 3a of the Uniform Code of Military Justice, as the Secretary of the Air Force, I hereby consent to the apprehension, return to Korea, and trial by court-martial of the said Robert W. Toth.

3. I hereby direct the Air Provost Marshal, United States Air Force to offset the apprehension of the said Robert W. Toth, presently residing at 220 Dunseith Street, Pittsburgh, Pennsylvania and cause him to be delivered forthwith to the Commanding General, Fifth Air Force, to answer the said court-martial charges.

1 Incl.

charge sheet

JAMES H. DOUGLAS
Acting Secretary

XII

Wherefor, the respondent respectfully prays this Court that the order to show cause be discharged and that the petition for a writ of *habeas corpus* be dismissed.

LEO A. ROVER
United States Attorney

EDWARD O. FENNELL
Assistant United States Attorney
Counsel for Respondent

CHESTER W. WILSON
Lieutenant Colonel, USAF
Office of The Judge Advocate
General, USAF
Washington, D. C.
Of Counsel

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90 CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing RETURN AND ANSWER TO RULE TO SHOW CAUSE was mailed to Al. Philip Kane, Esquire, attorney for the petitioner, at his address, 1331 G Street, N. W., Washington 5, D. C., this ..... day of June 1953.

EDWARD O. FENNELL
Assistant United States Attorney

91 Filed June 4, 1953

Accompanying Papers to Return and Answer Of Respondent Talbott

UNITED STATES OF AMERICA
DEPARTMENT OF THE AIR FORCE

Washington, D. C. May 29, 1953
(Place) (Date)

I HEREBY CERTIFY that the attached are photostatic copies of the original charges in the court-martial case of Robert W. Toth, civilian (formerly Airman First Class, AF 13 313 030), and of letter of the Acting Secretary of the Air Force consenting to the apprehension, return to Korea, and trial by court-martial of said Robert W. Toth, and directing the Air Provost Marshal, United States Air Force, to effect the apprehension of the said Robert W. Toth and cause him to be delivered forthwith to the Commanding General, Fifth Air Force, the originals of the attached copies being on file in the Office of The Judge Advocate General, United States Air Force.

S/ REGINALD C. HARMON
Major General, USAF
The Judge Advocate General,
United States Air Force

I HEREBY CERTIFY that Major General Reginald C. Harmon, who signed the foregoing certificate, is the Judge Advocate General, United States Air Force, and that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, HAROLD E. TALBOTT, Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the City of Washington, this 29th day of May, 1953.

(Seal)

HAROLD E. TALBOTT
Secretary of the Air Force
By PHILIP J. CURRAN
Administrative Assistant.

Filed July 2, 1953

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

H. C. No. 68-53

ROBERT W. TOTH, *Plaintiff*,

v.

HAROLD E. TALBOTT, *Defendant*.

Washington, D. C.,
Thursday, June 25, 1953.

Re: Petition for Writ of Habeas Corpus

Opinion of the Court

* * * * * * * * * *

23 The Court: Very well. You concede jurisdiction, then?

Mr. Bennell: Yes, Your Honor.

The Court: Very well.

* * * * * * * * * *

35 This case involves some novel questions under the new Code of Military Justice. There is presented to the Court a petition for a writ of habeas corpus against the Secretary of the Air Force. The undisputed facts are as follows.

The petitioner is a civilian residing in Pittsburgh, Pennsylvania. He is a former member of the armed forces of the United States and as such had served in Korea. On May 13, 1953, he was arrested at his place of employment in Pittsburgh by members of the military police and transported to Korea on a charge of having committed
36 murder there while a member of the armed forces.

This procedure was followed under the provisions of Article 3(a) of the Uniform Code of Military Justice, U. S. Code, Title 50, Section 553(a), which provides that any person charged with having committed while in a military status an offense against the Code of Military Justice punishable by confinement of five years or more, and for which that person cannot be tried in the courts of the

Fill in blank with numbers of pertinent charges and specifications or "all specifications and charges," as may be appropriate. For summary unless departmental regulations prevent such election.

THE ACCUSED HAS BEEN PERMITTED AND HAS ELECTED TO REFUSE PUNISHMENT UNDER ARTICLE 15 AS TO

RANK AND ORGANIZATION OF OFFICER EXERCISING JURISDICTION UNDER ARTICLE 15	SIGNATURE

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL	CASE NO. *(Inserted by convening authority)*

TO BE FILLED IN BY THE ACCUSED

I ☐ CONSENT ☐ OBJECT TO TRIAL BY SUMMARY COURT-MARTIAL	SIGNATURE OF ACCUSED

TO BE FILLED IN BY SUMMARY COURT IF APPLICABLE

When an accused has been permitted and has elected to refuse punishment under Article 15, trial by summary court-martial may proceed despite his objection.

1. THE ACCUSED, HAVING REFUSED TO CONSENT IN WRITING TO TRIAL BY SUMMARY COURT-MARTIAL AND NOT HAVING BEEN PERMITTED TO REFUSE PUNISHMENT UNDER ARTICLE 15, THE CHARGES ARE HEREWITH RETURNED TO THE CONVENING AUTHORITY.

RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

2. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79d, MCM, 1951? ☐ YES

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS
			NUMBER OF PRIOR CONVICTIONS CONSIDERED

2. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79d, MCM, 1951? ☐ YES

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS
			NUMBER OF PRIOR CONVICTIONS CONSIDERED

PLACE	DATE

RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

Enter after signature, "Only officer present with command," if such is the case.

TO BE FILLED IN BY CONVENING AUTHORITY

ORGANIZATION	PLACE	DATE

ACTION OF CONVENING AUTHORITY

RANK AND ORGANIZATION OF CONVENING AUTHORITY	SIGNATURE , COMMANDING

ENTERED ON APPROPRIATE PERSONNEL RECORDS IN CASE OF CONVICTION.

RANK AND DESIGNATION OF OFFICER RESPONSIBLE FOR THE ACCUSED'S RECORDS	SIGNATURE

NOTE: Summary of evidence, if required by the convening or higher authority, will be attached on separate pages.

DEFENSE San Antonio

United States or any territory thereof, or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of termination of said status.

In other words, that provision of the Uniform Code of Military Justice extends the jurisdiction of courts-martial to a civilian who had been a member of the armed forces in respect to certain offenses committed while the accused was a member of the armed forces. There is no provision, however, governing arrest or preliminary hearings or method of removing a person taken into custody for trial under this section.

It will be observed that the court-martial by which the accused is to be tried was not convened in Pittsburgh, where the accused lived, but in Korea, where the crime is said to have been committed.

There is no provision of law granting to members of the military police the power or authority to arrest a
37 civilian, even for the purpose of implementing the above-mentioned limited jurisdiction. Therefore, members of the military police, when they arrested the petitioner, had no greater power of arrest than would a private citizen. Obviously, every private citizen has certain powers of arrest, and those are the only powers that the members of the military police had in respect to this petitioner.

Rule 5 of the Federal Rules of Criminal Procedure requires a person making an arrest to take the arrested person, without unnecessary delay, before the nearest available United States Commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States.

The commissioner is required to give the person a preliminary hearing. To be sure, the commissioner is not empowered to hold the accused for trial by court-martial. He may hold him for trial only in a District Court. It may be perhaps that there is some way of removing the case from the District Court to the court-martial for trial. The fact is that there is an omission in the Code of Military Justice on this matter. No machinery is provided whereby

96 DEPARTMENT OF THE AIR FORCE
WASHINGTON

Apr 30 1953

Office of the Secretary

Subject: Return of Robert W. Toth (former Airman First Class, AF 13 313 030); Trial by Court-Martial

Thru: The Air Provost Marshal
Headquarters United States Air Force
Washington 25, D. C.

To: Commanding General
Fifth Air Force
APO 970, c/o Postmaster
San Francisco, California

1. Colonel Herman E. Hurst, a person subject to the Uniform Code of Military Justice, having appeared before Lieutenant Colonel Ben Taylor, Adjutant, Headquarters, 75th Air Depot Wing, an officer authorized by law to administer oaths, and he, the said Colonel Hermn E. Hurst, having been duly sworn, signed court-martial charges on 8 April 1953, charging Robert W. Toth (former Airman First Class, Af 1[illegible]13 030) with the premeditated murder of Bang Soon Kil, a male Korean national, on or about 27 September 1952 at K-9 Air Base, APO 970, in violation of the Uniform Code of Military Justice, Article 118; 50 U. S. C. Section 712; and with conspiracy on or about 27 September 1952 to commit premeditated murder, in violation of the Uniform Code of Military Justice, Article 81; 50 U. S. C. Section 675; the said Colonel Herman E. Hurst further having stated under oath that he either had personnel knowledge of or investigated the matters set forth in the charges; that the same are true in fact to the best of his knowledge and belief; the sworn court-martial charges with exhibits thereto having been laid before me; each offense as alleged against the Uniform Code of Military Justice being an offense for which a court-martial may adjudge confinement for five (5) years or more, committed by a person while in a status in which he was subject

a civilian can be arrested and removed to a distant point for trial by court-martial. It would be wrong for the Court to try to supply the machinery which Congress has omitted to furnish.

This subject is a very serious one, as the Court
38 sees it. One of the foundation stones of our Republic is that the civil power shall at all times be superior to the military power. It is a grave matter for military police to arrest a civilian and remove him for trial forthwith, without a hearing, to a distant point in this country or to a foreign country, as is the case in this instance, when there is no provision in any statute authorizing this to be done. I think it is the Court's duty to protect the person whose rights have been invaded in this respect.

The Court has no doubt but that the military acted in the best of faith. But I think it acted entirely without authority. The Court had some doubt as to its power to issue a writ of habeas corpus that would be effective in a foreign country in respect to a citizen of the United States. However, both the United States Attorney and the legal representatives of the Air Force, who is present in court, admit that such jurisdiction exists, and its existence was assumed without discussion by the Supreme Court of the United States in Burns v. Wilson, decided on June 15, 1953.

The Court does not feel that it is appropriate at this stage of the proceedings to pass upon the constitutionality of Section 3(a) of the new Uniform Code of Military Justice. That would be important if the court-martial had exercised its jurisdiction and had convicted and sentenced the petitioner. At this time the question is premature.

39 The Court will issue a writ of habeas corpus which will require the defendant to be brought back from Korea to appear before this court.

You may submit your order, gentlemen.

* * * * * * * * * * *

168 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Filed June 25, 1953

Habeas Corpus No. 68,33

UNITED STATES OF AMERICA EX REL AUDREY M. TOTH, *Petitioner*

vs.

HAROLD E. TALBOTT, Secretary of the Air Force, *Respondent*

Order for Issue of Writ of Habeas Corpus

Upon consideration of the Petition for Writ of Habeas Corpus, and the Rule to Show Cause issued herein on May 27, 1953, and the Return and Answer to Rule to Show Cause filed herein on behalf of the Respondent, and upon consideration of the briefs submitted on behalf of the Petitioner and the Respondent and the argument of counsel for the parties, and good cause being shown, it is by the Court this 25th day of June, 1953,

ADJUDGED AND ORDERED that the Clerk of the Court forthwith issue a writ of habeas corpus in this case, returnable in this Court at 10:00 o'clock A. M. on the 9th day of July, 1953, and it is further

ORDERED that the Respondent be directed to produce the body of Robert W. Toth before this Court at the time aforesaid.

s/s ALEXANDER HOLTZOFF
Judge

Seen:

EDWARD O. FENNELL
Assistant United States Attorney

169 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*

v.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*

Petition for A Stay of the Effectiveness of the Court's Order Pending Appeal

Comes now the respondent, Harold E. Talbott, by his attorney, Leo A. Rover, the United States Attorney in and for the District of Columbia, and respectfully petitions this court to stay the effectiveness of this court's order issuing a writ of habeas corpus, for the reason that the respondent feels there are substantial questions of law involved which should be considered by the United States Court of Appeals for the District of Columbia.

LEO A. ROVER
United States Attorney
EDWARD O. FENNELL
Assistant United States Attorney

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170 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*

v.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*

Filed June 25, 1953

Order

Upon consideration of respondent's petition for stay of effectiveness of this court's order pending appeal, it is

ORDERED, this 25th day of June, 1953, that the effectiveness of this court's order issuing a writ of habeas corpus be and it hereby is stayed during the pendency of respondent's appeal to the United States Court of Appeals for the District of Columbia Circuit, on condition that the appeal be diligently prosecuted and that the court-martial proceedings against petitioner be stayed in the meantime.

s/s ALEXANDER HOLTZOFF
Judge

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171 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*

v.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*

Notice of Appeal

Name and address of appellant:

Harold E. Talbott, Secretary of the United States Air Force

Name and address of appellant's attorney:

Leo A. Rover, United States Attorney, Washington, D. C.

Concise statement of judgment or order, giving date:

Order of the District Court, dated June 25, 1953, issuing a writ of habeas corpus

Name of institution where now confined, if not on bail:

A United States Air Force Stokade at Taegu, Korea.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date June 26, 1953

HAROLD E. TALBOTT,
Secretary of the United States Air Force
Appellant.

LEO A. ROVER, United States Attorney
Attorney for Appellant.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 11,883

HAROLD E. TALBOT, Secretary of the Air Force, *Appellant*,

vs.

AUDREY M. TOTH, *Appellee*

Motion to Dismiss the Appeal of Harold E. Talbot, Secretary of the Air Force

AND NOW comes AUDREY M. TOTH, by her Counsel, William A. Kehoe, Jr., and John J. McGrath, and moves this Honorable Court to dismiss the Appeal filed at the above number and term, for the following reasons:

1. That the Order of the United States District Court for the District of Columbia dated June 25, 1953 and indexed in that Court at Habeas Corpus No. 68 of 1953, a copy of which is attached hereto and marked "Exhibit A", is not a final order within the meaning of that term as it appears in the Act of June 25, 1948, c. 646, 62 Stat. 967, as amended, 28 U. S. C. 2253, but on the contrary is an interlocutory order which is not subject to review, on appeal, by this Honorable Court.

2. That the order above referred to in Paragraph 1 is not a final decision within the meaning of term "final decision" as such term appears in the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. 1291-1292, which defines the jurisdiction of the Courts of Appeals, and that therefore this Honorable Court is without jurisdiction to hear this appeal.

3. That said appeal is premature and without any basis in law or fact.

Respectfully submitted,

WILLIAM A. KEHOE, JR.
/s/ JOHN J. McGRATH
Attorneys for Appellee

c/o KANE AND KOOUR
1331 G Street, N. W.
Washington 5, D. C.

Filed Jul 31 1953

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1953

No. 11,883

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Appellant*,

v.

AUDREY M. TOTH, *Appellee*.

Before: EDGERTON, Acting Chief Judge, and PRETTYMAN, and PROCTOR, Circuit Judges.

Order

This case came on for consideration on appellee's motion to vacate the stay order entered herein by the United States District Court on June 25, 1953, and on appellee's motion to dismiss this appeal, and was argued by counsel.

Upon consideration whereof it is ORDERED by the Court that the stay order entered herein by the United States District Court on June 25, 1953, be, and it is hereby, vacated and that this appeal, be, and it is hereby, dismissed.

Dated: July 31 1953

PER CURIAM.

Habeas Corpus

172 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

H. C. 68-53

TO HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE

YOU ARE HEREBY COMMANDED, to have body of ROBERT W. TOTH by you restrained of his liberty, as it is said, by whatsoever names detained, together with the day and cause of his being taken and detained, before the Honorable WALTER M. BASTIAN, Judge of the United States Dis-

trict Court for the District of Columbia, at the court room of said Court, in the City of Washington, D. C. at 10:00 o'clock a. m., on the 1st, day of September, 1953, then and there to do, submit to and receive whatsoever the said Judge shall then and there determine in that behalf; and have you then and there this writ.

WITNESS the Honorable Chief Judge Bolitha J. Laws, United States District Judge at Washington, D. C. this 13th day of August, A. D. 1953.

HARRY M. HULL
Clerk.
By RITTA E. SHAYLAND
Deputy Clerk.

Filed August 26, 1953

173 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*,

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*.

Motion to Discharge Writ of Habeas Corpus, Dismiss Petition, and Remand Petitioner to Custody of Respondent

Comes now the respondent by his attorney, the United States Attorney, and, for the reasons contained in the attached memorandum of points and authorities, respectfully moves this Court to discharge the writ of habeas corpus, dismiss the petition therefor and remand the petitioner to the custody of respondent.

/s/ LEO A. ROVER
United States Attorney
/s/ WILLIAM J. PECK
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been served personally on attorney for petitioner, William A. Keboe, Jr., Esq. 1331 G Street, N. W., Washington, D. C., this 26th day of August, 1953.

/s/ WILLIAM J. PECK
Assistant United States Attorney

Habeas Corpus No. 68-53

41 UNITED STATES OF AMERICA *ex rel.* AUDREY M. TOTH, *Petitioner*,

v.

HAROLD E. TALBOTT, Secretary of the Air Force, *Respondent*.

Thursday, September 3, 1953.
Washington, D. C.,

The above-entitled matter came on for hearing at 10:30 o'clock a. m., on Thursday, September 3, 1953, in the United States District Court for the District of Columbia, in the Court House, at Washington, D. C.

BEFORE: HONORABLE ALEXANDER HOLTZOFF, District Judge of the United States District Court for the District of Columbia.

66 **Opinion of the Court**

The Court (Holtzoff, J.): This case comes before this Court on a return to the writ of habeas corpus previously issued.

The petitioner for the writ is a civilian, residing in Pittsburgh, Pennsylvania. He was taken into custody in Pittsburgh by police of the Air Force of the United States Army and transported to Korea for trial by court martial on a charge of murder.

Article 3(a), U. S. Code, Title 50, Section 553(a) of the Uniform Code of Military Justice provides that a former member of the military or naval personnel shall be amenable to trial by court martial for certain offenses committed or alleged to have been committed by him while he was in a military or naval status.

67 The charge on which it is proposed to try this petitioner and for which he was taken into custody is a charge of murder said to have been committed while the petitioner was a member of the Armed Forces.

The petitioner for the writ originally challenged the constitutionality of Article 3(a) of the Uniform Code of Military Justice and further challenged the legality of the procedure followed in transporting the petitioner from the place where he was apprehended to Korea.

A rule to show cause why a writ should not be issued was at first granted and after full hearing held on the return to the rule to show cause this Court issued the writ.

This Court adheres to the view that it expressed at that time. The Court deems it premature to pass upon the constitutionality of Article 3(a). The proper time to do so would be if and when the petitioner were tried and convicted by court martial.

The question before the Court, however, is the legality of the restraint of the petitioner in Korea: Article 7(b), (U. S. Code, Title 50, section 561(b)) of the Uniform Code of Military Justice authorizes persons empowered by regulations governing the Armed Forces to apprehend persons, subject to trial by court martial, to do so upon reasonable belief that an offense has been committed and that the person apprehended has committed it. Obviously, this is no greater power than is possessed by every

68 civilian. Any private person may make an arrest for a felony which has been committed upon reasonable belief that the person whom he is arresting has committed that felony.

Article 9(c), which is found in U. S. Code, Title 50, Section 563(c), provides that a civilian subject to trial by

court martial may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject. Obviously, the petitioner is a civilian. He is not subject to the authority of any commanding officer. The statutory provision seems to be a nonsequiter.

Irrespective of this consideration, however, even if it were to be assumed that the apprehension of the petitioner in Pittsburgh were legal, the question still arises, and that is the crux of this case, whether there was any authority to transport him for trial to a distant point, such as Korea.

Congress has not spoken on this subject. The Code contains no provision authorizing the transportation of a civilian from the point where he is apprehended to a distant point for trial by court martial. As the Court indicated on the prior hearing, it has no authority to supply a gap that Congress has not filled.

Transportation of a person to a distant point for trial involves serious consequences. It is contrary to the principle of American institutions to remove a person
69 to a distant point for trial without express authority to do so and without appropriate safeguards provided by statute. In fact, one of the grievances of the Colonists that led to the American Revolution was a threat on the part of the British authorities to remove certain persons from the Colonies to the British Isles for trial.

Whether Congress may constitutionally authorize the military to transport a person to a distant point for trial without a hearing need not be determined because Congress has not done so. It is not a power that can be implied, and it has not been granted expressly.

I reiterate what I said at the prior hearing, namely, that under our system of laws, the civil power is paramount over the military and that the military authority must be exercised within the ambit authorized by Congress.

I do not doubt the good faith of the military in pursuing the course that they have followed, but it is the view of this Court that power to do so does not exist and that there is no authority to remove a civilian for trial by court

martial to a distant point from the point where the civilian is apprehended.

The Court will sustain the writ for the reasons indicated and will discharge the petitioner.

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* * * * * * * * * * *

224 Filed: September 3, 1953

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*,

VERSUS

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*.

Judgment of Release and Discharge

Upon consideration of the Petition of Audrey M. Toth, sister of Robert W. Toth, the Writ and Answer of Respondent and upon consideration of the Motion to Discharge Writ of Habeas Corpus, Dismiss Petition and Remand Petitioner to Custody of Respondent filed herein on behalf of the Respondent, and the Petitioner's opposition thereto, and the briefs of both parties and argument of counsel in open court, it is by the Court this 3rd day of September, 1953,

ADJUDGED AND ORDERED that Respondent's Motion to Discharge Writ of Habeas Corpus, Dismiss Petition and Remand Petitioner to Custody of Respondent be and the same is hereby overruled, and it is further

* * * * * * * * * * *

/S/ ALEXANDER HOLTZOFF
Judge

Seen:

_____,
Assistant U. S. Attorney

225 Filed: September 3, 1953

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*,

v.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*.

Order

Upon consideration of the respondent's oral motion for stay of effectiveness of the order of this Court, granting the petition for writ of habeas corpus filed by the petitioner herein, it is,

ORDERED this 3rd day of September, 1953, that the effectiveness of this Court's order granting said petition for writ of habeas corpus be and it is hereby stayed during the pendency of respondent's appeal to the United States Court of Appeals for the District of Columbia.

IT IS FURTHER ORDERED that Robert W. Toth be and hereby is released from the custody of the respondent; provided, however, that the said Robert W. Toth post a bond in the sum of One Thousand Dollars ($1000.00) with surety approved by the Clerk of this Court, conditioned upon his appearance before this Court at the conclusion of the appeal which may be taken by the respondent herein.

s/s HOLTZOFF, J
Judge

226 Filed: September 8, 1953

UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*,

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*.

Notice of Appeal

Name and address of appellant Harold E. Talbott, Secretary of the United States Air Force.

Name and address of appellant's attorney Leo A. Rover, United States Attorney, Washington, D. C.

Offense ——

Concise statement of judgment or order, giving date, and any sentence Order of the District Court, dated September 3, 1953, granting a writ of habeas corpus, and discharging petitioner on bond.

Name of institution where now confined, if not on bail. ——

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date September 8, 1953

/s/ HAROLD E. TALBOTT
Appellant
HAROLD E. TALBOTT,
Secretary of the United States
Air Force.
/s/ LEO A. ROVER
Attorney for Appellant.
LEO A. ROVER,
United States Attorney

Mail copy to attorney for Petitioner:
William A. Kehoe, Jr., Esq.,
1331 G Street, N. W.,
Washington, D. C.

☆U. S. GOVERNMENT PRINTING OFFICE 1953—274257/P.O. 398

[fol. 36] Monday, December 21, 1953

* * * *

Before Honorable Henry W. Edgerton, E. Barrett Prettyman and George T. Washington, Circuit Judges

* * * *

HAROLD E. TALBOTT, Secretary of the United States Air Force, Appellant,

v.

UNITED STATES OF AMERICA EX REL. AUDREY M. TOTH, Appellee

Mr. Oliver Gasch, attorney for the appellant, introduced to the Court Lt. Col. Chester W. Wilson, of the bar of the Supreme Court of the State of Wisconsin, who is on the brief for the appellant.

The argument in the above-entitled case was commenced by Mr. Oliver Gasch, attorney for the appellant, at 2:32; continued by Mr. John J. McGrath, a member of the bar of the Supreme Court of Pennsylvania, who, on motion of Mr. William A. Kehoe, Jr., was permitted to argue, pro hac vice, by special leave of Court, for the appellee, at 3:06; and concluded by Mr. Gasch, at 3:32 to 3:43.

The Court denied Mr. McGrath's oral motion for leave to file an affidavit executed by Robert W. Toth.

[fol. 37] IN THE UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11964

HAROLD E. TALBOTT, Secretary of the United States Air Force, Appellant

v.

UNITED STATES OF AMERICA EX REL. AUDREY M. TOTH, APPELLEE

(File endorsement omitted)

Appeal from the United States District Court for the District of Columbia.

Decided March 25, 1954

Mr. Oliver Gasch, Principal Assistant United States Attorney, with whom *Mr. Leo A. Rover*, United States Attorney, *Messrs. Edward O. Fennell* and *Lewis A. Carroll*, Assistant United States Attorneys, and *Mr. William J. Peck*, Assistant United States Attorney at the time the brief was filed, were on the brief, for appellant. *Lt. Col. Chesler W. Wilson*, of the bar of the Supreme Court of Wisconsin, who was allowed to appear *pro hac vice*, was also on the brief for appellant.

Mr. John J. McGrath, of the bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of Court, with whom *Mr. William A. Kehoe, Jr.*, was on the brief, for appellee.

OPINION—Filed March 25, 1954

[fol. 38] Before EDGERTON, PRETTYMAN and WASHINGTON, Circuit Judges.

PRETTYMAN, Circuit Judge: Robert W. Toth[1] was honorably discharged from the United States Air Force on December 8, 1952, after service in Korea. On April 8, 1953, he was formally charged, under the forms and pro-

[1] This action was brought in his behalf by Audrey M. Toth, his sister.

cedure of the Uniform Code of Military Justice,[2] with a premeditated murder allegedly committed in Korea on or about September 27, 1952, that is, while he was in the service.[3] On May 13, 1953, he was apprehended by military personnel at his place of employment in Pittsburgh, Pennsylvania. After various events, including conversations and statements the details of which are in dispute, he was taken by military authorities by plane to Korea, where he was confined pending investigation and trial. Two qualified military counsel were assigned to represent him, and a civilian lawyer from Pittsburgh, retained by his family, flew to Korea with the assistance of the Air Force.

Toth's sister filed a petition for a writ *of habeas corpus* in the United States District Court for the District of Columbia. A rule to show cause was issued; after hearing the writ was issued;[4] Toth was produced in court; a [fol. 39] hearing was held, and Toth was ordered released.[5] The Secretary of the Air Force appealed. The order of release was stayed pending this appeal, and Toth was given liberty under bond.

The problem dissolves into parts. The question in the first part is whether Toth, being a civilian at the time of the filing of charges and at the time of apprehension, is amenable to trial by court-martial for crimes allegedly committed by him while he was in the military service.

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[2] 64 STAT. 108 (1950), 50 U.S.C.A. § 551 *et seq.*

[3] There were two charges, one for conspiracy to murder, in violation of Article 81 of the Uniform Code of Military Justice, and the other for commission of the murder, in violation of Article 118 of the Code, of a Korean named Bang Swoon Kil at or near the K-9 Air Base in Korea on or about September 27, 1952.

[4] Toth v. Talbott, 113 F. Supp. 330 (D.C.D.C. 1953). An appeal from that order was dismissed by this court July 31, 1953, as the order was not final or otherwise appealable.

[5] Toth v. Talbott, 114 F.Supp. 468 (D.C.D.C. 1953).

Article 3(a) of the Uniform Code of Military Justice provides:

> "Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status."

We think it is clear from the quoted language that, so far as the statute is concerned, the answer to the question above posed is affirmative. The legislative history confirms that view.[6] Indeed, although appellee makes the point, which we shall discuss in a moment, that the Uniform Code itself does not make Toth triable by court-martial, her principal point is that if the statute be construed to make Toth triable it is unconstitutional and therefore invalid.

[fol. 40] Appellee says that Toth, being a civilian and not a soldier at the time charges were placed against him and when he was apprehended, was and is entitled to due process of law in the constitutional sense applicable to civilians. This includes the rights to indictment and trial by jury, as guaranteed by the Fifth and Sixth Amendments, and also to preliminary hearing, removal hearing and all the other provisions of the Federal Rules of Criminal Procedure. Due process of law in military procedure differs, of course, in material respects from due process in the civilian world.[7]

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[6] *Hearings before House of Representatives Subcommittee on Armed Services on H. R. 2498*, 81st Cong., 1st Sess. 617, 800, 883-4, 902, 1262 (1949); H. R. Rep. No. 491, 81st Cong., 1st Sess. 5 (1949); Sen. Rep. No. 486, 81st Cong., 1st Sess. 8 (1949); Morgan, *Court-Martial Jurisdiction Over Non-Military Persons Under the Articles of War*, 4 Miss. L. Rev. 79, 83-84 (1920).

[7] Burns v. Wilson, 346 U.S. 137; 97 L.Ed. —, 73 S.Ct. 1045 (1953).

That a man is answerable for a crime as of the time, place and circumstance of its commission, rather than the time, place and circumstance of his apprehension, is a familiar concept of the law. If a person commits a murder in Paris, France, and is apprehended in Chicago, Illinois, he is triable in Paris under French law, not in Chicago under Illinois law. Indeed, so far as this country itself is concerned, the Sixth Amendment guarantees that an accused be tried where the crime is committed, and he is removable to that place for that purpose.

Trial for an offense is under the law applicable at the time of the offense, unless some other specific arrangement is dictated by the legislature. Under general principles of law a subsequent change of circumstances surrounding the accused, or in the condition in which he may find himself, does not affect his liability for an offense, unless the contrary is indicated by legislation. We see no constitutional infirmity in amenability to trial at the place of the offense and under the law applicable to the offense at the time of its commission.

The Constitution[8] gave Congress power "To make Rules [fol. 41] for the Government and Regulation of the land and naval Forces". Congress has made such rules, and among them is the one before us. In effect this section of the Uniform Code is no more than a provision by Congress that an honorable discharge from military service shall not be an absolution for crimes theretofore committed. In substance and effect it is a general condition attached by Congress to discharges from the service. We perceive no constitutional invalidity in such a provision.

Both parties seek aid from the Fifth Amendment, which excepts from the requirement of indictment or presentment "cases arising in the land or naval forces". Appellee says a case arises when a charge is made; hence the case against Toth did not arise until April 8, 1953, the date the charges were filed, which was after his discharge; hence the case did not arise in the land or naval forces; hence he cannot be held to answer unless upon indictment. She relies upon the decisions which define a "case" for the "Cases" and

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[8] Art. I, § 8, cl. 14.

"Controversies" clauses of Article III of the Constitution. The Government says a case arises when the crime is committed; hence the Constitution itself excepts the present case from requirement for indictment. It seems to us that although a crime does not become a case, *i.e.*, a legal proceeding, until a charge is made, a case *arises* when the crime is committed; just as a man is born on the day of his birth, although he is not a man until many years thereafter. We think the case against Toth arose in the military forces. This view is in accord with the views expressed in In re *Bogart* [9] and *Kronberg* v. *Hale*.[10]

From 1863 [11] until the enactment of the Uniform Code of Military Justice in 1950, there was in force a statute, [fol. 42] in several successive forms,[12] which provided that a person accused of committing fraud against the Government while in military service was amenable to trial by court-martial after his discharge from the service. The validity of those enactments has been before the federal courts several times [13] and has repeatedly been upheld. The full discussion in the opinion in the earliest of these cases, In re *Bogart*, *supra*, is both pertinent and interesting. In the latest case cited to us, *Kronberg* v. *Hale*, *supra*, the court remarked: "Certainly, or so it seems to us, it is now too late for any federal court short of the Supreme Court to do other than accept the provision as valid." The Supreme Court denied *certiorari*.[14]

In *Hirshberg* v. *Cooke* [15] the Supreme Court discussed the

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[9] 3 Fed. Cas. 796, No. 1,596 (C.C.Cal. 1873).

[10] 180 F.2d 128, 131 (9th Cir. 1950).

[11] 12 STAT. 696.

[12] Article of War 60, REV. STAT. § 1342 (1878); Article of War 94, 41 STAT. 805 (1920), amended, 62 STAT. 640 (1948); Art. 44 (Eleventh) of Articles for the Government of the Navy, 34 U.S.C.A. § 1200, Art. 14 (Eleventh) (1928).

[13] *In re* Bogart, *supra*; *Ex parte* Joly, 290 Fed. 858 (S.D. N.Y. 1922); Terry v. United States, 2 F.Supp. 962 (W.D. Wash. 1933); United States v. Hildreth, 61 F.Supp. 667 (E.D.N.Y. 1945); Kronberg v. Hale, *supra*.

[14] 339 U.S. 969, 94 L.Ed. 1377, 70 S.Ct. 987 (1950).

[15] 336 U.S. 210, 93 L.Ed. 621, 69 S.Ct. 530 (1949).

1863 statute and its successors. The question was whether a man in the Navy could be tried by court-martial for a maltreatment of prisoners allegedly committed by him during a prior enlistment at the end of which he had been discharged. The applicable statute was one of the Articles for the Government of the Navy,[16] the language of which was not specific on the point. The Court based its decision upon its interpretation of that statute. In doing so it stressed the difference between the ambiguous language before it and the clear provisions of the 1863 and similar acts. [fol. 43] The Court did not discuss or pass upon the constitutionality of those statutes. The significant thing to us in our present problem is that it did not mention the subject. It pointed to the 1863 statute *et alia* as containing clear provisions that an ex-service man remained amenable to trial by court-martial for certain offenses committed while in the service, but it did not so much as intimate that such a provision might be unconstitutional. It seems certain that, if the Court had had doubts of the constitutional validity of the 1863 act and its successors at the time it was discussing those statutes in the manner it did in the *Hirshberg* case, it would have indicated those doubts. After all, the invalidity of statutes in force for some eighty-five years and repeatedly upheld by federal courts would be noteworthy in any discussion of the subject. To be sure, such a negative feature of an opinion is not binding authority, but it is certainly a feature of the state of the law upon the topic. We note the fact.

If the statute of 1863 and its successors were valid constitutionally, Article 3(a) of the Uniform Code of Military Justice is valid. The fact that the old statute was applicable to only one crime, while the new one is applicable generally, makes no difference upon the constitutional question.

Appellee contends that Article 3(a) of the Uniform Code does not apply to Toth, because, she says, he can be tried in a court of the United States for the offenses with which he is charged. The argument may be stated as follows, although it is not thus arranged in the brief: Murder committed at a place within the special territorial jurisdiction of the United States is an offense against the United

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[16] 34 U.S.C.A. § 1200, Art. 8.

States.[17] Any land reserved or acquired for the use of the United States and under the exclusive or concurrent [fol. 44] jurisdiction thereof is within the special territorial jurisdiction of the United States.[18] Toth was accused of a murder committed at or near K-9 Air Base, which was in the Republic of Korea. At this point in the argument appellee makes an assertion, which is merely an assumption, that air bases used by the United States Air Force in Korea in 1952 were lands reserved for the use of the United States and under the exclusive or concurrent jurisdiction thereof. Offenses against the United States committed out of the jurisdiction of any particular state or district are to be tried in the district where the offender is found.[19] It follows from this argument, says appellee, that Toth can be tried in the federal District Court for the Western District of Pennsylvania, where he was found, and is therefore not amenable to trial by court-martial.

No authority is cited to us to indicate that K-9 Air Base or any other land in South Korea used as an air base by the United States armed forces was or is, legally speaking, reserved for the use of the United States (or even of the United Nations) or under its exclusive or concurrent jurisdiction, and our research has failed to reveal any authority to that effect. It does not appear, therefore, that the offenses with which Toth is charged could be tried as offenses against the United States within the jurisdiction of a District Court.[20] So far as the United States is concerned, the offenses appear to have been violations of Articles 81 and 118 of the Uniform Code of Military Justice, which provide that any persons in the Military service who commit murder or [fol. 45] conspire to commit murder shall be punished as a court-martial may direct.

The second part of the general problem on this appeal is whether the basic principles of due process of law re-

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[17] 18 U.S.C. § 1111(b).

[18] 18 U.S.C. § 7(3).

[19] 18 U.S.C. § 3238.

[20] See United States v. Bowman, 260 U.S. 94, 67 L.Ed. 149, 43 S.Ct. 39 (1922); Schooner Exchange v. M'Faddon, 7 Cranch (11 U.S.) 116, 3 L.Ed. 287 (1812).

quire that a civilian accused in court-martial charges be given a hearing—call it either preliminary or removal—by a magistrate before he is transported so great a distance as from Pittsburgh, Pennsylvania, to the Republic of Korea. It is not urged that such a requirement applies to a person who is in the service at the time of his apprehension; obviously such a person is subject to orders to go wherever his superiors direct. The contention is that such a requirement, characterized by counsel as a minimum procedural safeguard, attaches to a civilian.

This contention as to preliminary hearing really falls into two parts. The first concerns a hearing preliminary to trial. The second concerns a hearing preliminary to removal to the place of trial. In criminal cases in the courts the constitutional requirement for indictment affords opportunity for inquiry by an independent tribunal into probable cause before the accused is put to his defense. The Constitution specifically excepts cases arising in the land or naval forces from the requirement of indictment. But the Uniform Code of Military Justice makes elaborate provisions for preliminary hearing before the accused is put to trial. Article 32 of the Code provides that charges shall not be referred to a general court-martial for trial until a "thorough and impartial" investigation has been made. At such "investigation" the accused has the right to counsel, civilian or military, and full opportunity to cross-examine witnesses against him and to present anything he may desire in his own behalf. If the charges are then forwarded, a statement of the substance of the testimony taken on both sides must accompany them. Article 34 provides that before directing trial the convening authority must secure the consideration and advice of his legal officer and shall not refer a charge for trial unless he has found [fol. 46] that the charge is warranted by the report of the evidence upon the investigation. These provisions of the Uniform Code seem to afford an accused as great protections by way of preliminary inquiry into probable cause as do requirements for grand jury inquiry and indictment. The record indicates, and indeed we must assume in the absence of showing to the contrary, that Toth will be afforded the full protection provided by the Uniform Code. Thus the basic purpose of a hearing preliminary to trial is being

met by a method designed pursuant to constitutional provisions, and the method meets all elements essential to due process in that feature of the proceedings.

The main burden of appellee's contention is that Toth is entitled to a preliminary hearing before removal. Such a requirement might exist by reason of constitutional provisions or by reason of statutory provisions. "There is no constitutional right to a hearing in advance of removal", the Supreme Court said in *United States* ex rel. *Kassin* v. *Mulligan*.[21] And again the Court said, "The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the Court having jurisdiction of the charge."[22] We must deem it settled then that there is no constitutional necessity for hearing prior to removal to the proper place for trial.

There is no statutory requirement for a hearing before removal in military cases. The 1863 statute and its successors provided that an accused "shall continue to be liable to be arrested and held * * * in the same manner and to the same extent as if he had not been so separated [fol. 47] therefrom", *i.e.*, from the service.[23] We do not find any similar provision in the Uniform Code, but neither does the Code contain a requirement for hearing prior to removal to the place of trial.

In the federal courts hearings prior to removal are required by Rules 5 and 40 of the Federal Rules of Criminal Procedure, but those Rules do not apply to court-martial proceedings.

Appellee cites to us the rule of the *McNabb* case.[24] That rule dealt with the admissibility of confessions. It is clear from the opinion in that case and the opinions in the

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[21] 295 U.S. 396, 460, 79 L.Ed. 1501, 55 S.Ct. 781 (1935) (opinion by Mr. Justice Butler).

[22] Hughes v. Gault, 271 U.S. 142, 149, 70 L.Ed. 875, 46 S.Ct. 459 (1926) (opinion by Mr. Justice Holmes).

[23] See 62 Stat. 641 (1948).

[24] McNabb v. United States, 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608 (1943).

Mitchell[25] and *Upshaw*[26] cases that the requirment for prompt preliminary hearing was imposed by the Supreme Court as a rule of evidence in the federal courts and not as a rule of constitutional necessity.

Section 11(b) of the Manual for Courts-Martial[27] provides: "Jurisdiction under Article 3*a* should not be exercised without the consent of the Secretary of the Department concerned." "Article 3*a*" is the part of the Uniform Code with which we are presently concerned. Section 11(b) of the Manual is a safeguard interposed by the President[28] against the arbitrary subjection of civilians to trial by courts-martial for offenses committed while they were in the service. This provision has been complied with in the present case.

[fol. 48] Most important in this connection is the fact that the federal courts were open to Toth upon petition for a writ of *habeas corpus* at every instant after his apprehension.[29] Whatever constitutional rights Toth had were always enforceable in a federal court.

It is well to keep in mind that the sole purpose of a removal proceeding is to make certain that the accused is not being transported without probable cause to believe that he committed the offense. It is not its purpose to impede the trial of an accused for an offense for which there is reason to put him to his defense. So, when discussion relates to the inconvenience, cost, etc., of long-distance removals, it must be remembered that the inconvenience, etc., which is to be condemned relates only to removal without probable cause. If there be probable cause to believe the accused guilty, he is amenable to trial, and the inconvenience to him of that trial is immaterial. An accused

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[25] United States v. Mitchell, 322 U.S. 65, 88 L.Ed. 1140, 64 S.Ct. 896 (1944).

[26] Upshaw v. United States, 335 U.S. 410, 93 L.Ed. 100, 69 S.Ct. 170 (1948).

[27] 16 Fed. Reg. 1303, 1308 (1951).

[28] Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951).

[29] Burns v. Wilson, *supra* note 7.

cannot interpose valid objections to trial by removing himself a long distance from the scene of the alleged offense.

We are accustomed to the idea that a hearing preliminary to removal out of this country for crime is essential to a valid removal. But that idea stems from our familiarity with extradition proceedings. In those proceedings one sovereignty is transferring to the custody of another sovereignty a person found within the former state. A responsibility is upon the asylum state not to surrender its resident or visitor without probable cause. The matter is controlled by extradition treaties or statutes. But none of those principles applies to a case like the present one. Here it is not proposed to remove the accused from the custody of the United States Government.[30] The United States apprehended him, and the United States proposes to try him. [fol. 49] The removal is a matter of distance, not a matter of jurisdiction.

Toth has not urged that due process requires that he be given a hearing before a civil tribunal prior to being subjected in any way to the jurisdiction of a military tribunal. We have considered that question, however, because we think it may be a more fundamental inquiry in this case than the question whether Toth is entitled to a hearing before being removed from the territorial limits of this country. But we have found no principle or precedent which would make a civilian hearing a constitutional prerequsite of military jurisdiction over Toth. Ex parte *Milligan*[31] no doubt stands today for the proposition that if the military authorities lack jurisdiction over a civilian *habeas corpus* will effectuate his release at any stage of his confinement. But neither that case nor those following it contain any suggestion that if the military authorities do have jurisdiction over a civilian there must be a preliminary hearing before a civil tribunal to make his apprehension by those authorities and trial before a military tribunal constitutionally valid.

Cases arising under the draft laws are not helpful. If

[30] Beavers v. Henkel, 194 U.S. 73, 48 L. Ed. 882, 24 S.Ct. 605 (1904).

[31] 4 Wall. (71 U.S.) 2, 18 L.Ed. 281 (1866).

the relator has never been "actually" inducted into the army within the meaning of the governing statute, *habeas corpus* lies to challenge his purported induction and bring about his release.[32] In such cases the induction is the dividing line between civil and military jurisdiction. But in the present case there is no attempt to put Toth back into the armed services. He is a civilian who is to remain a civilian, even though for certain restricted purposes Congress has declared that civilians in his category are to remain subject to military law and trial before military [fol. 50] tribunals. Military trials of civilians and other non-members of the armed services in limited classes of cases antedate our Constitution.[33] It may be that Congress cannot in time of peace add to those classes of cases by making civilians subject to military justice in cases not "arising in the land or naval forces" within the meaning of the Fifth Amendment. But that question is not before us now. All Congress has done here is to deal with a class of cases which did arise in the armed services. As pointed out earlier in this opinion, it is too late for any court other than the Supreme Court to say that its action in so doing was unconstitutional, even though no provision was made for a hearing before civilian authorities prior to the subjection of the accused to military law.

Some suggestion is made that the question of hearing is moot, since Toth is now before a federal court and has had a hearing. In so far as Toth's claim relates to rights which arose from the fact of his apprehension and his initial removal from this country, perhaps it is moot. He has had opportunity to present such a claim to a court. But, in so far as his claim is upon other grounds, involving amenability to military authority or attacking military processes, it is not moot. Certainly we cannot say that the whole hearing problem as Toth presents it is moot.[34]

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[32] See Billings v. Truesdell, 321 U.S. 542, 88 L.Ed. 917, 64 S.Ct. 737 (1944).

[33] *Cf. Ex parte* Quirin, 317 U.S. 1, 87 L.Ed. 3, 63 S.Ct. 1 (1942).

[34] See Eagles v. Samuels, 329 U.S. 304, 91 L.Ed. 308, 67 S.Ct. 313 (1946).

The trial court expressed the view that there is no power or authority to remove a civilian for trial by court-martial to a point distant from the place where he is apprehended.[35] We think, as we have indicated at length, that the statute [fol. 51] which makes a civilian amenable to trial by court-martial necessarily connotes authority to apprehend him for that purpose and to remove him for trial to the place where the alleged offense was committed.

It may very well be that Congress should add to the Uniform Code a provision that a civilian apprehended under Article 3(a) pursuant to court-martial charges should not be removed from continental United States for trial until he has had a preliminary hearing before either a civil magistrate or a military tribunal. After all, transposition from civilian life back into military life and transportation from continental United States to far places of the earth are violent events, even though it be to an accused's benefit to be tried at the place where the crime is allegd to have been committed. And from the standpoint of the military establishment a routine authoritative inquiry prior to drastic removal steps would save time, expense and complications, if in the absence of such an inquiry the federal courts are likely to order an accused returned, as was done in the case at bar. But such questions are for Congress, not for the courts. The Constitution put the government of the land and naval forces in the hands of the legislative branch, not of the judicial branch. Absent constitutional invalidity in legislative action, or in executive action purportedly pursuant to legislative direction, the courts have no function in that field. Therein the situation differs from that in the field of court proceedings, where the Supreme Court has supervisory authority over procedure.

The sum of the matter as to a removal hearing in military proceedings is (1) that the Constitution does not require one, (2) that no statute requires one, and (3) that the judicial branch of government has no power to require one. When an accused alleges to a court that he is actually threatened with removal in violation of a constitutional or statutory right, the court will hear him. [fol. 52] The situation is illustrated by the present case, in

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[35] *Supra* note 5, at 470.

which the accused upon petition to a court was given a hearing upon the constitutional validity of his apprehension and removal. But the court cannot consider alleged procedural invalidity in military proceedings which do not involve a violation of constitutional or statutory requirements.

It is suggested that Articles 3(a) and 9(c) of the Uniform Code are inconsistent with each other. The latter Article provides that a civilian subject to the Code "may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject". But "arrest or confinement" in military parlance is a restraint by order, as contrasted with a taking into custody, which is termed "apprehension". A strict distinction between the two is made in military rules.[36] We see no inconsistency between the Articles.

Assertions that fundamental precepts of that fair play which constitutes so much of the American sense of due process of law have been violated, always arouse interest and particular care. So it is in this case. But we must be mindful that this man is accused of committing a premeditated murder while in uniform and that the line of authority which proposes to subject him to trial upon that accusation is a legal authority acting under rules established by the Congress itself under direct authority of the Constitution itself. We have examined his contentions with care. We can perceive no constitutional reason why his liability to apprehension and trial according to the rules applicable to him at the time and place of the commission of the crime should not follow him to other places and past his discharge into civilian life. If we found the provisions of those rules inherently invalid, [fol. 53] or the officials abusing their authority, we would exercise our power of protection. We do not find them so.

The judgment of the District Court will be reversed and the case remanded with instructions to discharge the writ and to return Toth to the custody of the military authorities.

Reversed and remanded.

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[36] See Secs. 18-21 of the Manual for Courts-Martial, 16 Fed. Reg. 1310-1311 (1951).

[fol. 54] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Mar. 25, 1954. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, JANUARY TERM, 1954

No. 11,964

HAROLD E. TALBOTT, Secretary of the United States Air Force, Appellant,

v.

UNITED STATES OF AMERICA, ex Rel. AUDREY M. TOTH, Appellee

Appeal from the United States District Court for the District of Columbia

Before Edgerton, Prettyman, and Washington, Circuit Judges

JUDGMENT

This cause came on to be heard on the original record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

Dated: March 25, 1954.

Per Circuit Judge Prettyman.

[fol. 55] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Apr. 26, 1954. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,964

HAROLD E. TALBOTT, Secretary of the United States Air Force, Appellant,

vs.

UNITED STATES OF AMERICA, ex Rel. AUBREY M. TOTH, Appellee

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.
2. Minute Entry of Argument.
3. Opinion.
4. Judgment.
7. This designation of record.
8. Clerk's certificate.

William A. Kehoe, Jr., Attorney for Appellee.

Certificate of Service

I certify that I personally served a copy of the foregoing Designation of Record on Leo A. Rover, Esq., United States Attorney, attorney for appellant herein, on the 26th day of April, 1954.

William A. Kehoe, Jr.

[fol. 56] Clerk's Certicate to foregoing transcript omitted in printing.

[fol. 56] Filed June 25, 1953, Harry M. Hull, Clerk

H. C. 68-53

UNITED STATES OF AMERICA

DEPARTMENT OF THE AIRFORCE

Washington, D. C., 17 June, 1953

I hereby certify that the attached are photostatic copies of duplicate originals of the following: affidavit of Park R. McCandless, 29 May 1953; affidavit of Joseph T. Kearns, Jr., 29 May 1953; certified true copy of statement of Captain Edwin A. Jerome, 22 May 1953; affidavit of Staff Sergeant Cesar A. Rodriguez, 29 May 1953; affidavit of Staff Sergeant Cesar A. Rodriguez, 29 May 1953; affidavit of Staff Sergeant William F. Mayers, 29 May 1953; affidavit of Captain Edwin A. Jerome, 29 May 1953; certified true copy of letter to Captain Edwin A. Jerome, 13 May 1953; photostatic copy of receipt for prisoner, Robert W. Toth, civilian 18 May 1953; certified true copy of Letter Orders: 166; subject: Temporary Duty Orders, Hqs CONAC, 12 May 1953; affidavit of Major George S. Owen, 29 May 1953, with three incls.; and original additional charges in court-martial case of Robert W. Toth, civilian (formerly Airman First Class, AF 13 313 030). Duplicate originals of the attached copies are on file in the office of The Judge Advocate General, USAF.

Albert M. Kuhfeld, Brigadier General, USAF Acting
The Judge Advocate General, USAF.

I hereby certify that Brigadier General Albert M. Kuhfeld, who signed the foregoing certificate, is the Acting The Judge Advocate General, United States Air Force, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Harold E. Talbott, Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secre-

tary of the Department, at the City of Washington, this 17th day of June, 1953.

Harold E. Talbott, Secretary of the Air Force. By Philip J. Curran, Deputy Administrative Assistant. (Seal.)

[fol. 57] Harrisburg, Pennsylvania, 29 May 1953

Come, Park R. McCandless, who being first duly sworn does depose and swear as follows:

On March 1953, Major Owen L. Colaw, District Commander, 3d District Office of Special Investigations (IG) USAF, advised me by telephone that Special Agent Joseph T. Kearns, Jr. would arrive in Pittsburgh, Pa. the following day. Major Colaw directed me to assist Kearns in interviewing Robert W. Toth, 220 Dunseith Street, Pittsburgh, Pa., former A/1C, AF-43313030, and that the purpose of the interview was to determine any knowledge Toth might have regarding the homicide of a male Korean National in the Bomb Dump Area, 543d A.S.S.D., APO 970, during the period 26-27 September 1952.

A previous investigation had revealed that Toth was employed by the Jones and Laughlin Steel Corporation, Pittsburgh, Pa. I had also determined that Toth was currently employed as a Bed Helper, Rolling Mill Conditioning Department at the Second Avenue Plant, with Time Card No. 5784. Also that he was expected to report for work at 0001 hours 11 March 1953 at the No. 18 Mill Gate, and would work until 0800 hours 11 March 1953.

Kearns arrived at the office of the Pittsburgh, Pa. Detachment 081, 701 Victory Building, at 1200 hours 10 March 1953. He acquainted me with the details of the case involving Toth from reports previously submitted. It was decided that the best time to interview Toth would be after he left the Plant at 0800 hours 11 March 1953. Through contacts in the Jones and Laughlin Police Department, it was arranged to have the guard at No. 18 gate, identify Toth as he left the Plant at 0800 hours 11 March 1953.

On 11 March 1953 at 0715 hours, I left the Pittsburgh Detachment office by automobile with Kearns and Mrs. Marian Hunt, Pittsburgh Detachment stenographer. We arrived at No. 18 gate at approximately 0735. Mrs. Hunt remained

in the car. I told the guard at the gate who I was, and he said that he had been instructed by the guard sergeant to identify Toth.

At 0800 hours, the guard brought a man to Kearns and I, who were waiting at the gate, and identified him as Toth. Kearns and I exhibited our credentials and identified ourselves as Special Agents of the Office of Special Investigations to Toth. Kearns asked Toth if he would come to the OSI office with us on an official matter and Toth agreed. We left the Plant at approximately 0805 hours. Nothing was said regarding the nature of the official business, during the trip to the Detachment office.

At 0830 hours Toth was interviewed in the Detachment Commander's office by Kearns in the presence of Mrs. Hunt and myself. Kearns kept a log of the interview. I read to Toth the 5th Amendment to the Constitution of the United States and Article 31(b), Uniform Code of Military Justice and explained to him his rights under each. Kearns stated to Toth that the matter under investigation was the homicide of a male Korean National in the Bomb Dump Area, 543d A.A.S.D., APO 970, on 26-27 September 1952. [fol. 58] At this time Toth admitted to Kearns knowledge of the incident but said he did not want to discuss it. Toth continued that he had never discussed it with any other person, that he had forgotten it until now, and would not say anything about it on the grounds that he might incriminate himself. Kearns asked him a number of additional questions and then asked Toth to think over his refusal for a few minutes. Toth repeated that he did not want to talk about it and would "Sweat it out."

Kearns told Toth that he was not under restraint of any kind and could leave whenever he wanted. At 0930 hours Toth said he wanted to go and the interview was terminated.

Further, the deponent sayeth not.

Park R. McCandless, Special Agent, 3d District OSI (IG) USAF.

Sworn and subscribed to before the undersigned authority at Olmsted Air Force Base, Middletown, Pa., this 29th day of May 1953. George C. Perry, III, 1st Lt, USAF, Summary Court and Judge Advocate.

[fol. 59] Harrisburg, Pennsylvania, 29 May 1953

Come, Joseph T. Kearns, Jr., who being first duly sworn does depose and swear as follows:

On March 1953, I was directed by Major Owen L. Colaw, District Commander, 3d District Office of Special Investigations (IG) USAF, Harrisburg, Pa., to proceed to Pittsburgh, Pa. I was instructed to interview, together with Special Agent Park R. McCandless, former A/1C Robert W. Toth, AF-13313030, 220 Dunseith Street, Pittsburgh, Pa. The purpose of this interview was to determine whether Toth participated in, or had knowledge of, the homicide of a male Korean National in the Bomb Pump Area, 543d A.S.S.D., APO 070, during the period 26-27 September 1952.

I departed Harrisburg, Pa. at approximately 0700 hours, 10 March 1953, and arrived at the Office of the Pittsburgh, Pa. Detachment of the 3d District Office of Special Investigations (IG) USAF at approximately 1200 hours, 10 March 1953. I reported to Special Agent Park R. McCandless, Detachment Commander. The facts of the case as known to that point were discussed by both of us and a plan of operation was developed.

Prior to my arrival, Special Agent McCandless had determined that Toth was employed as a Bed Helper in the Rolling Mill Conditioning Department, Second Avenue Branch, Jones and Laughlin Steel Corporation, Pittsburgh, Pa. It had been determined also that Toth, Time Card No. 5784, was working on the 0001-0800 hours shift for the next several days. McCandless learned that Toth entered and left the plant through the No. 18 Mill Gate.

Subsequent to my arrival, McCandless arranged with the Jones and Laughlin Steel Corporation Plant Police to identify Toth as he left work at 0800 hours, 11 March 1953.

0715 hours, 11 March 1953, McCandless and I, together with Mrs. Marian Hunt, Stenographer, Pittsburgh, Pa. Detachment, left that office and proceeded by personally-owned automobile to No. 18 Mill Gate, Jones and Laughlin Steel Corp. We arrived at that point at approximately 0735 hours. McCandless identified himself to the guard on duty at that point, who stated that he had been instructed by his superiors to identify Toth for us.

At 0800 hours, 11 March 1953, Toth was identified by the guard. I spoke to Toth, introducing McCandless to him, and both of us identified ourselves by presenting our OSI credentials. At this time, I asked Toth whether he would voluntarily accompany McCandless and me to the Pittsburgh Pa. Detachment Office. It was explained to him that it was a matter of official business which required his presence. Toth agreed to volutarily accompany us to the office. At this time I reminded Toth that he was just finishing a shift of work and asked him whether he felt the need for sleep. Toth said that he had had a good night's sleep prior to reporting for work, and that he was not tired.

[fol. 60] We departed No. 18 Mill Gate at approximately 0805 hours, 11 March 1953, and arrived at the Pittsburgh, Pa. Detachment Office at approximately 0825 hours. During the ride to the office Toth, McCandless and I engaged in general conversation in which the subject under investigation was not mentioned.

Upon arrival at the Detachment Office, Toth stated to the writer that he had debated during the ride to the office whether he should ask at that time why he had been requested to accompany us to the office and what was the nature of the official business. He added that he had decided not to do so because his duties as an air policeman overseas had brought him into contact with OSI, and he knew that he would be advised of this information at the proper time.

The interview with Toth began at 0830 hours, 11 March 1953. It was held in the Office of the Detachment Commander, Special Agent McCandless. Present were McCandless, Toth, Mrs. Hunt and writer. Initially Toth was again advised of the identities of McCandless and the writer. At 0832 hours, McCandless read to Toth Article 31(b), Uniform Code of Military Justice, and the 5th Amendment to the Constitution of the United States. His rights under both were explained to him by McCandless. I advised Toth that the investigation being conducted concerned the homicide of a male Korean National in the Bomb Dump Area, 543d AA.S.D., APO 970, during the period 26-27 September 1952. In response to my questioning, Toth admitted that he had knowledge of the incident in question, but that he did not want to discuss it. He stated that he did not want to discuss it because he did not to incriminate himself.

He said that he would not voluntarily furnish information concerning the incident. Toth advised that he had not discussed it with anyone, adding that he had forgotten all about it until the time of the interview. He said that he did not want to furnish a statement, indicating that he would not discuss the matter. Toth said that he was aware of the purpose of the investigation, and that he would rather not talk. He denied that he had a sense of loyalty to anyone else concerning this matter.

I explained to Toth that I was aware that perhaps he had not had time to collect his thoughts, having been confronted at his place of employment and requested to voluntarily accompany us to the detachment office. I suggested that he consider the situation, his knowledge of it, and his participation in it. Toth again stated that he did not with to talk about it. Toth advised that he was not a member of the Reserves, and that he did not intend to leave the area. I again told Toth that we were not going to threaten him, nor promise him anything. I pointed out the advantage of Toth giving us his side of the story to the best of his knowledge. Toth said that he did not want to talk about it and that he would "sweat it out".

During the interview, I repeatedly advised Toth that he was not under arrest and was not to consider himself as being held against his will. I pointed out that he had accompained us voluntarily, and that he could terminate the interview when he desired. After making the statement that he would "sweat it out", Toth said that he wished to leave. I immediately agreed, and Toth left the detachment office at 0930 hours, 11 March 1953.

[fol. 61] Further, the deponent sayeth not.

Joseph T. Kearns, Jr., Special Agent, 3d District OSI (IG) USAF.

Sworn and subscribed to before the undersigned authority at Olmsted Air Force Base, Middletown, Pa., this 29th day of May 1953. George C. Perry, III, 1st Lt, USAF, Summary Court and Judge Advocate.

[fol. 62] 22 May 1953

Statement :

I Edwin A. Jerome, Captain, AO 802757, 2500 Air Base Wing, Mitchel AFB, Hempstead, New York, prior to making the following statement have had my rights under Article 31 MCM 1951 (5th Amendment to the Constitution), read and explained to me by Special Agent James W. Reese who has identified himself to me as a Special Agent of the Office of Special Investigations, USAF. I understand those rights and freely and voluntarily make this statement without being compelled to do so by any form of duress, coercion, hope of reward or promise of immunity.

The undersigned, after duly receiving orders to arrest and apprehend Robert W. Toth at Pittsburgh, Pennsylvania, effected the same on 13 May 1953. While transporting Toth to Korea aboard Pan American Flight 331/16, subject made the following statement to me concerning his alleged offense while in Korea.

He stated on the night of the alleged offense that he was Sgt of the Guard and that he had been notified that a trespasser was apprehended on a security post at the bomb dump. The Air Police Sentry who had K-9 sentry dog with him had the trespasser at bay. Upon arriving at the scene, Toth stated he told the Air Police Sentry, Kinder, that their orders were to shoot any trespassers. The trespasser was then loaded aboard the Air Police jeep and taken back to Air Police Headquarters.

Toth further stated that while going back to Air Police Headquarters, the trespasser who was a Korean National attempted to grab his pistol from his holster. Upon doing this, Toth had the jeep stopped and proceeded to beat the Korean National with his pistol as punishment. Toth stated that they then proceeded to Air Police Headquarters where the OD and Lt Schreiber were notified. Toth stated that Lt Schreiber directed him to return the Korean National to the place of apprehension and dispose of him by shooting him. Toth stated that he objected to this but complied with the order regardless. Upon arriving at the original

place of apprehension, Toth and Kinder unloaded the Korean National from the jeep. Toth stated that Kinder refused to shoot the Korean National because he did not feel that it was just. Toth then again reminded Kinder of his orders and stated that he would depart the scene and when he returned, he expected Kinder to carry out his orders because of the previous order of Lt Schreiber and the apparent directives which allowed the use of weapons on trespassers of restricted areas. Toth further stated that he left the scene about 100 yds and upon hearing the shot, [fol 63] returned to the scene where the original apprehension was made.

Toth stated that the Lt had previously instructed them to re-enact the complete scene so that it would conform with a routine shooting in a restricted area.

The undersigned asked why this whole thing took place and Toth stated that he believed the Lt was "out to get glory". He stated that as a result of this act, the unit was later commended in official communications. Toth further stated that while in Pittsburgh, Pennsylvania, he received a letter from Lt Schreiber which stated that this incident was presently under investigation and that he advised Toth to keep quiet about the whole thing.

The undersigned gained this information through an informal interview with Toth while enroute between Honolulu and Wake Island. It was made voluntarily during the course of conversation. I advised Toth that he did not have to tell me if he did not want to and I did not explain his rights under the 31st Article to him. Despite these facts, he made the statement to me voluntarily. I believe that similar statements were made under the same circumstances to the two escort Air Policemen accompanying me—M Sgt Charles E. McCreedy and A 1C Albert R. Menard.

I have read this statement consisting of 2 pages and have initialed all pages and corrections. This statement, which

I have given voluntarily and now sign voluntarily, is the truth to the best of my knowledge and belief.

(S.) Edwin A. Jerome.

WITNESSES:

(S.) Dargle R. Stuckey, Capt.
(S.) James W. Reese.

A certified true copy.

Louis F. Alyea, Lt Col. USAF, Acting Staff Judge Advocate, Continental Air Command.

[fol. 64] AFFIDAVIT

STATE OF NEW YORK,
County of Nassau ss:

S Sgt Cesar A. Rodriguez, AF 19305575, having been duly sworn, deposes and says as follows:

On the 14th day of May, 1953, at approximately 1730 at the guardhouse shower room, Andrews AFB, I was on duty as Air Police guard in custody of Robert Toth. At that time I accompanied him into the shower room, my instructions being that I was to remain with him at all times until properly relieved. Robert Toth, without being asked to make any statement or answer any questions by me, voluntarily stated the following information to me:

"I was on duty as the Sergeant of the Guard in Taegu at the 'bomb-up'. A 'gook' who was drunk came into the area. The guard was on duty with a dog and he hollered twice to the Gook to halt and when the Gook didn't stop he tried to get the dog to stop him and the dog wouldn't attack. Then the guard fired two shots. These shots woke me and I went to the area in a government jeep, where I had heard the shots. When I arrived I asked the guard what was the matter and the guard told me what had happened. Then Toth tried to get the dog to attack the Gook, and the dog wouldn't attack. The guard and I, together, put the Gook in the jeep. After we got the Gook in the jeep, the Gook who was in the back I was driving and he went for my pistol. I knocked hell out of him with the

back of my hand, hit him behind the ear. I took the Gook on to the office and reported to the Officer of the Guard. I told the officer what had happened and he said take him out and shoot him. Then I drove the Gook and the guard back to the 'bomb-up'. I knew they were going to shoot the guy but I didn't want anything to do with it so I got the hell out of there. When I was back at the guardhouse I heard a shot, got in the jeep [fol. 65] and went back to the 'bomb-up'. When I got there, I saw the Gook lying on the ground. He had been shot. I called for an ambulance and they transported the Gook to the hospital and he died in the hospital.

"I went back to the guardhouse and wanted to make a report of the incident, put it in the log book, but the officer told me to forget about it, that he didn't want it put in the report. I had forgotten all about it until I came back to the States and one day I found out from a neighbor that the OSI had been over there asking questions about it and they were tailing me. One day they picked me up and held me for about three hours and because it was so embarrassing to me in the neighborhood and because of the way they treated me, I wouldn't give them any information. I'm glad I'm going back because I want to get it over with. I know everything is going to be alright.

"Toth also stated the officer's name who said to shoot the Gook but I don't recall the name."

I have read over the above statement and reviewed all the contents and state to the best of my knowledge and belief that it is an accurate and true representation of what was stated to me by Robert Toth and in substantially the same words, to the best of my memory.

Cesar A. Rodriguez, S/Sgt., AF 19305575

Subscribed and sworn to before me, this 29th day of May, 1953.

Louis F. Alyea, Lt. Col., USAF, Acting Staff Judge Advocate, Continental Air Command.

[fol. 66] AFFIDAVIT

STATE OF NEW YORK,
County of Nassau, ss:

S/Sgt. Cesar A. Rodriguez, AF 19305575, having been duly sworn, deposes and says as follows:

On the 12th day of May, 1953, I was called down to Continental Air Command Headquarters at approximately 1600 hours in the afternoon. I was informed by Major Owen, Assistant Provost Marshal, Continental Air Command, that I had been detailed for an apprehension. Major Owen briefed S/Sgt. Mayers and myself. Major Owen told us what was going to take place; that we were going to the town of Pittsburgh, Pa., first and then we were to go to Washington. He told us to be at Base Operations at 0930 the next morning. We took off from Mitchell Air Force Base at about 1000 hours, the 13th day of May 1953.

We landed at Pittsburgh, 2253rd AFRCTC and I was instructed by Major Owen to wait there while he and other Air Policemen and Captain Jerome went into Pittsburgh.

Approximately two hours elapsed. At approximately 1700 hours I was at Base Operations and was ordered down to the Provost Marshal's Office. I was instructed by Major Owen that I would now be in charge of Toth. The Major identified Robert Toth to me. They were then processing Toth and I was guarding him. The party then proceeded to the mess hall. We ate in the Officer's section of the mess hall, and Toth and I sat at one table and ate together. He ate a full meal, and when he finished his meal, I asked him if he wanted any more, and he stated "no". After finishing the meal, we returned to the Provost Marshal's Office. At this time he was allowed to make a telephone call to his family.

His mother answered the phone and he requested to speak to his stepfather. He told his stepfather that he was picked up by the AP's, that they were taking him back to Korea, that they should not worry about anything and that he would

[fol. 67] be home in about a week. We had said nothing to indicate to him that he would be gone only a week. During the conversation he said to tell his girl that, "I am sorry I can't take her to the prom Friday night." He said, "Wait until you get into the service long enough and you will find they can take you back." After he hung up he said "That was my little brother who is in the service."

Major Owen then asked him if he wanted to get in touch with a lawyer or anyone else. He replied in the negative. Major Owen asked him the second time if he wanted to make another telephone call and he said, "no".

After that, the Major instructed the that we were ready to leave, and we proceeded to the waiting aircraft and to Andrews AFB. During the plane flight Toth slept most of the time.

On arriving at Andrews AFB, Toth and the party dismounted from the aircraft. At this time I was instructed by Major Owen to get into a vehicle with Toth and see that he was transported to Andrews AFB Hospital for a physical examination.

At the infirmary Toth was given a complete checkup by a Medical Officer, in my presence. He made no objection to the examination. After the examination, he was transported to the Base Guardhouse.

Major Owen said that Sgt. Mayers and myself would be in charge of guarding Toth and he wanted one of us to be there at all times.

About midnight I asked Toth if he wanted anything to eat and he said "no". About that time he retired and went to sleep. All during the night he was under the guard of either Sgt. Mayers or myself. He slept well and we woke him at approximately 6 o'clock and asked if he wanted to eat. He had a full meal. I asked him if he wanted to shave and he said, "no". He was given a towel, soap and shaving equipment by the Guard Supervisor.

Toth ate breakfast in the guardhouse. I then asked if he wanted anything; and he refused. About 11 o'clock I asked him again if he was hungry and he said, "no". He said he

wanted a cup of coffee and he was then given a cup of coffee.

About 8 o'clock that morning I told Toth he could write a letter if he wanted to and he said he did not have any paper [fol. 68] so I got some writing paper and a pencil so he could write a letter home. He gave me the letter which I in turn gave to Major Owen.

At approximately 1300 hours I was relieved by another guard to get some rest. About 1630 we again assumed responsibility of the guard. I again asked the man if he was hungry. This time a tray was brought to him and he did not eat everything on the tray. I then asked him if he needed anything and he said, "no". I asked him if he wanted anything to read; if he wanted to write any more letters; and if he had enough smokes? He replied that he had everything; he did not want to write any letters, and he had enough to read and had enough cigarettes, and that he had been given a carton of cigarettes. During this time he was not upset and acted normal.

Before dinner he took a shower. I was relieved about 1800 hours and laid down in the next room. From 1800 to 2400 hours, Sgt. Mayers had responsibility of guarding Toth.

About midnight I again resumed responsibility. I immediately checked, he seemed to be sleeping well. I awoke him about 0530 and told him to get ready as we were going to leave about 0700. His breakfast was brought in and he ate a large breakfast; then he went in and washed up and shaved. During the time he was taking the shower, he said that we were treating him like a king. That is when he stated that he had been an Air Police and he was never treated so good by anyone.

That morning, about 0730, we left Andrews AFB and arrived at Washington International Airport at approximately 0815. We proceeded to the VIP Lounge. I bought him a couple of cokes. His morale was high and he did not seem depressed.

At approximately 1000 I was instructed by the Flight Clerk, that we could board the aircraft. At this time we

boarded the aircraft and Toth was turned over to Captain Jerome. At no time was any force of any kind used.

Cesar A. Rodriguez, S/Sgt, AF 19305575

Subscribed and sworn to before me this 29th day of May, 1953. Maude E. Hansen, Notary Public, State of New York, No. 30-1668100, Qualified in Nassau Co., Term expires March 30, 1955. (Seal.)

[fol. 69] AFFIDAVIT

STATE OF NEW YORK,
County of Nassau, ss.

S Sgt. William F. Mayers, AF 20228205, having been duly sworn, deposes and says as follows:

On the 12th day of May, 1953, I was instructed to report to Continental Air Command Headquarters, at approximately 1600 hours. I was informed by Major Owen, Assistant Provost Marshal, Continental Air Command, that I had been detailed for an apprehension. During this meeting I learned that I was part of an apprehension team that was going to Pittsburgh to apprehend a civilian who was a former member of the Air Force. I was instructed to be at Base Operations at 0930 hours the following morning. We departed from Mitchel Field by aircraft at approximately 1000 hours, 13 May 1953.

We landed at Pittsburgh at approximately 1335 hours. At approximately 1530 hours, Major Owen, Captain Jerome, M Sgt. McCreedy, A/1C Menard and myself departed from the airport for the OSI Office. A brief conference in regard to this apprehension was held and we then proceeded with the same persons and two OSI agents, whose names I do not know, to the steel plant where the apprehension was to take place. We arrived in what I think was the plant guard office and Toth, together with members of the plant police force, was in the office. Toth was informed by Major Owen of the charges against him and advised of his rights. Then the party with Toth in custody proceeded to the Pittsburgh air base arriving at approximately 1700 hours. Toth was taken to the Provost Marshal's Office and the necessary information was obtained from him to fill in forms regarding

the apprehension. His personal items were checked and receipted for and Major Owen asked if he wanted to make any phone calls. Toth made a phone call to his home and informed his family that he had been apprehended by the Air Police and was to be taken to Korea. During the conversation he stated that it was for the same thing about which he was picked up for before. After this pro- [fol. 70] cessing was completed Sgt. Rodriguez and myself were informed by Major Owens that Toth was assigned to us for custody until the plane departed for Korea.

We departed Pittsburgh approximately 2035 hours and arrived at Andrews AFB at 2240 hours. Immediately on landing Toth was taken to the Dispensary and given a complete medical examination. Sgt. Rodriguez and myself and Toth proceeded to the base guardhouse from the Dispensary where Toth was to be quartered until his departure for Korea.

During our stay at the base guardhouse, Toth was made as comfortable as possible and was well fed and cared for at all times. He was given anything he requested. He had cigarettes, writing material, toilet articles and Air Force clothing. He was told he could write letters and did write a letter to his mother. Toth did not seem depressed and slept well.

On the 15th of May, at approximately 0730 hours, Sgt. Rodriguez, Toth and myself departed from Andrews for the Washington International Airport in a government vehicle where Toth was placed in the custody of Captain Jerome in a Government aircraft and we were released of all responsibility for his care and control. At all times when I was in Toth's presence he seemed normal, not depressed or worried about the incidents. He stated that he was well treated by us and shook hands with us when he got on the plane for Korea. At no time was any force of any kind used and at no time did he make any resistance or indicate any lack of cooperation.

William F. Mayers, S/Sgt, AF 20228205.

Subscribed and sworn to before me this 29th day of May, 1953.

Louis F. Alyea, Lt Col, USAF Acting Staff Advocate
Continental Air Command

[fol. 71] AFFIDAVIT

STATE OF NEW YORK
County of Nassau, ss.

Edwin A. Jerome, Captain, USAF, AO 802757, having been duly sworn, deposes and says as follows:

I am an Air Police Officer, assigned as Confinement Officer of the Base Guardhouse, 2500th Air Base Wing, Mitchell Air Force Base, New York. On 12 May 1953 I was notified that I was selected to perform the mission of assisting in the apprehension and return to Korea of civilian Robert W. Toth. I received a letter of instruction from the Air Provost Marshal, Continental Air Command, Mitchel Air Force Base, New York, per letter, Subject: Transfer of Prisoner Robert W. Toth to Commanding General Fifth Air Force, Headquarters Continental Air Command, dated 13 May 1953 and my orders per Letter Order 166, Headquarters Continental Air Command, dated 12 May 1953, true copies attached.

The following is a chronological report of the events that transpired in the apprehension and subsequent return to Korea of Robert W. Toth, in which I participated.

12 May 1953 Eastern Daylight Saving Time

1000—Briefed by Colonel Royal, Continental Air Command Air Provost Marshal and Major Owens at Mitchell Air Force Base, New York.

1530—Received orders and supplemental instructions.

13 May 1953

1030—Departed Mitchel Air Force Base, New York, by C-47, with Major Baggett, Pilot, Major Owen and four Air Policemen: M/Sgt McCreedy, S/Sgt Rodriguez, S/Sgt Mayer and A/1C Menard.

1335—Arrived at Greater Pittsburgh Municipal Airport.

1515—Arrived at Pittsburgh Detachment, OSI Headquarters, and was briefed by the Detachment Commander, Major [fol. 72] McCandless on the final details of the apprehension.

1550—Arrived at Police Department Office of the Jones

and Laughlin Steel Corporation,' 3516 2nd Avenue, Pittsburgh, Pennsylvania.

1600—Lt. Smithey of the Plant Police turned Toth over to Major Owen who placed prisoner under arrest. Major Owen identified himself and asked subject his name and former serial number. Major Owen then read Toth the charges and specifications against him. Article 31, Uniform Code of Military Justice, was then read and explained to Toth by Major Owen.

1610—A wall search was conducted on the prisoner by M/Sgt McCreedy. No weapon was found; all personal property was searched and held.

1615—Subject was handcuffed to A/1C Menard and was transported to Greater Pittsburgh Municipal Airport with Captain Jerome and M/Sgt. McCreedy in a "carry-all." Prisoner was respectful, docile and amenable to instructions.

1640—Arrived at Greater Pittsburgh Airport and proceeded to Air Police Headquarters and the Office of Captain Keller, Air Provost Marshal. Prisoner was interviewed by Captain Jerome, who prepared a DD Form 578 for Major Owen's signature.

1700—A detailed search of the prisoner was made and all his personal property was receipted for on the DD Form 578. Those items of Toth's personal property which he desired to send to his parents were initialed and turned over to Captain Keller, Air Provost Marshal. Captain Keller prepared a hand receipt of those items of property which would be picked up by Toth's parents.

1715—Toth was again advised of his rights under Article 31, Uniform Code of Military Justice, by Major Owen. Toth signed a statement indicating same.

1730—Subject was escorted to the Base Dispensary where he received a preliminary physical examination by the Base Flight Surgeon. Administered medication, ear drops and APC pills for a running ear and slight cold. Flight Surgeon signed certificate stating that subject was physically fit for [fol. 73] trip to Korea. Prisoner appeared in good spirits and maintained a very level head despite his adverse circumstances. No signs of neurosis apparent.

1800—Prisoner returned to Air Provost Marshal' office and requested that the charges, specifications and warrant

be reread to him. Major Owen complied and asked subject if he desired to call a civilian lawyer. Subject declined and stated he would wait to obtain defense counsel at final destination. Prisoner stated to M/Sgt McCreedy and A/1C Menard that he knew the details of the alleged murder. Prisoner stated that Friday is payday and that he had $170.00 back pay accrued. Assured him that his company would keep the money for him; he concurred.

1820—Prisoner returned to Air Provost Marshal office where he was granted a phone call to his parents. Toth talked to his Father and Brother for approximately four minutes. He stated that he was resigned to his fate, that he would return to Korea for trial and that he intended to straighten this matter out himself. He advised his family not to worry, that the outcome would be "OK".

1925—A standard press release was prepared by the Air Provost Marshal office in the event that newspapers demanded a story. Toth stated he did not want the press to have knowledge of his arrest. His desires were respected.

2035—Departed Greater Pittsburgh Municipal Airport with the same crew and passengers plus one prisoner.

2240—Arrived at Andrews Air Force Base, Maryland. Prisoner remained in good spirits. Escorted to the base guardhouse by air police guards and CWO Headricks, Air Police Operations Officer.

2250—Prisoner was confined to protective custody under guard of S/Sgt Rodreguez and S/Sgt Mayer.

2400—Officer and M/Sgt McCreedy and A/1C Menard retired to bed.

14 May 1953

0530—Prisoner awoke; ate a full meal.

[fol. 74] 0600—Washed.

0615—Refused medication. Overall actions and conditions of prisoner appeared to be very good.

0900—Requested pencil and paper to write a letter to Mrs. Nexting Mexez, 220 Dunseith Street, Pittsburgh 13, Pennsylvania. Also stated that he had a good night's sleep.

1200—Toth stated that he was not hungry and refused lunch, but drank a cup of coffee.

1205—Prisoner refused medication. Major Owen censored his letter with permission from Toth.

1000—Captain Jerome coordinated transportation, physical examination and immunization at the Military Air Transport Service Headquarters Building. Priorities and transportation confirmed.

1305—M/Sgt McCreedy and A/1C Menard picked up prisoner at base guardhouse and proceeded to clothing warehouse.

1310—Clothes were issued by 1st Lieutenant R. L. Miller, Clothing Sales Officer, and a copy of sale was retained by Major Owen.

1350—Departed Clothing Sales Store for Dispensary.

1415—Arrived at dispensary. Prisoner was given x-ray, a urine and blood test.

1430—Major Owen asked Toth if he wanted to see the base officer of the Judge Advocate's Department or Chaplain. Prisoner declined. Dr. Morris made out a certificate as to Toth's physical condition for Major Owen. Subject's teeth were checked by Dr. Thomas Holtzman, and seven cavities were found and scaled.

1500—Prisoner, Captain Jerome, M/Sgt McCreedy and A/1C Menard received necessary immunization. No noticeable after effects.

1530—Immunization shots were given to Toth and records turned over to Captain Jerome.

1545—Departed dispensary and proceeded to barber shop. [fol. 75] 1550—Arrived barber shop, and while Toth was getting haircut, Major Owen and M/Sgt McCreedy purchased cigarettes, writing paper, stamps, handerchiefs, magazines for the prisoner and themselves.

1605—Left Barber Shop and PX to base guardhouse.

1615—Arrived base guardhouse where Toth was fed. He ate a hearty meal.

1745—Took shower and changed into issued clothing. Again refused medication.

1800—No significant changes in prisoner. All necessary processing completed as planned.

For the balance of the evening, Toth was turned over to M Sgt McCreedy and A 1C Menard.

2045—Prisoner went to latrine.

2100—Went to bed, fell asleep.

0500—Prisoner awakened, bathed.
0600—Ate full breakfast in guardhouse.
0630—Declined medication, not required, stated that he felt good.
0720—Depart guardhouse, Andrews Air Force Base, with prisoner, Major Owen, Captain Jerome, and four Air Police guards in two vehicles.
0825—Arrived Washington National Airport.
0845—Completed weighing and processing in.
0945—Loaded aircraft, Military Air Transport Service Flight D, 74-15, Navy R6D (DC-6) (C-118A) No. 131662, Pilot: Et Hicks (VR-3 Squadron).
1005—Taxied for take-off. Experienced mechanical trouble; defective #3 engine, returned to ramp.
1105—Take off from Washington National Airport effected after 1 hour delay.
1500—Served in-flight lunch. Prisoner ate everything. Very smooth flight. ETA 2130 EDST 1830 PDST, Travis Air Base, California.
[fol. 76] 1805—Pacific Daylight Saving Time—Arrived at Travis.
1900—Prisoner taken to base guardhouse, Fifth Air Police Squadron Retraining Center.
1915—Captain Jerome processed records and arranged a flight to Japan. Good cooperation and support was given from Military Air Transport Service personnel.
2000—Captain Jerome sent wire to Continental Air Command, information: Far East Air Force, Fifth Air Force.
2050—Both ate full meal which was cold. He made no comments. After chow, he washed and shaved, went to latrine.
2150—Return to cell fell asleep.
2345—Prisoner awakened; departed guardhouse for Military Air Transport Service terminal.
2400—Luggage weighed in and checked, awaited loading in "Protocol" Lounge. No one has had contact with prisoner.

16 May 1953

0645—Loaded aboard aircraft ahead of other passengers.

0745—Take off, routine, very smooth flight aboard PAA Flight 331 16 Aircraft #8927. Pilot: Mr. Cootz. Estimated time enroute to Honolulu International Airport 11½ hours.

0800—Everyone awake after comfortable nap. Prisoner ate cold box lunch; he remained in high spirits.

1100—Arrived Honolulu International Airport, Oahu, Territory of Hawaii, (Territory of Hawaii Time)

1130—Hot meal was served at Airport restaurant by PAA.

1200—Allowed prisoner to write two post cards. Nothing significant contributed. Prisoner commented on the good treatment he is receiving. Remained in VIP lounge with prisoner.

1330—Boarded same aircraft.

1400—Departed take off Honolulu time.

1430—Toth began sleeping.

[fol. 77] 1600—He fell asleep.

1905—Toth awoke.

2050—Crossed International Date Line (Gained one day).

17 May 1953 Wake Island Time

2250—Arrived Wake Island, boarded bus to mess hall. Prisoner stated he was not hungry. Had tomato juice and coffee.

2330—Went to local PX, purchased cigarettes for him.

2400—Boarded same aircraft—Wake Island Time.

18 May 1953

0005—Experienced mechanical difficulty, before take off.

0010—Deplaned awaiting mechanical difficulty correction.

0015—Take off, departed Wake Island. Estimated time enroute, 10 hours.

0130—Prisoner fell asleep.

0700—Prisoner awakened, ate full meal. Continues to be stable and has good morale. Estimated Time of Arrival at Haneda Airport, Tokyo is 2300Z GMT 17 May. One hour longer than proposed ETA (Estimated Time of Arrival). Sent in wire at Travis Air Force Base, California.

0840—Tokyo Time. Landed at Haneda Airport.

0900—Confined prisoner at local Air Police detention facility. Good cooperation from Major Murphy, Haneda Air Force Base Provost Marshal. Prisoner took shower and shaved. Captain Jerome made arrangements to immediately depart on a scheduled Far East Air Force aircraft bound for K-2 Air Base, Taegu, Korea.

1005—Departed Haneda aboard C-47 #6644 routine flight. Several very important people aboard.

1510—Landed at K-2, prisoner escorted to Fifth Air Force Correction Center.

1600—Prisoner delivered to T. Sgt Josephenson, NCOIC, Correction Center. Prisoner receipted for by 2nd Lieutenant Warren White.

1750—Reported to Lt Colonel Harris, Air Provost Marshal, Fifth Air Force for briefing. All necessary details and documents delivered. Mission completed.

[fol. 78] During the period of time that he was in my presence Robert W. Toth was respectful and obedient. He offered no resistance whatsoever and his conduct was above reproach.

Attached to this affidavit are true copies of the following documents:

1. Letter of instructions; subject: Transfer of Prisoner Robert W. Toth to Commanding General Fifth Air Force, dated 13 May 1953.

2. Letter Order 166, Headquarters Continental Air Command, dated 12 May 1953.

3. Receipt for prisoner, WD AGO Form 19-74, dated 18 May 1953.

Edwin A. Jerome, Capt, USAF, AO 802757

Subscribed and sworn to before me this 29th day of May 1953. Louis F. Alyea, Lt Col: USAF Acting Staff Judge Advocate Continental Air Command.

[fol. 79] HEADQUARTERS

CONTINENTAL AIR COMMAND

Mitchel Air Force Base, New York

PM 261-TOTH, R. W. 13 May 1953

Subject: Transfer of Prisoner Robert W. Toth to Commanding General Fifth Air Force

To: Captain Edwin A. Jerome, AO 802757, 2500th Air Base Group, Mitchel Air Force Base, N. Y.

1. You will proceed on 13 May 1953 to Pittsburgh, Pennsylvania, together with M Sgt Charles E. McCreedy and A/1C Albert R. Menard, and such other personnel as may be required, to assist Major George S. Owen, this headquarters, in effecting the apprehension of former A/1C Robert W. Toth. Major Owen will be the officer charged with the responsibility of the prisoner until delivery is made to you at the MATS terminal at Washington International Airport.

2. Upon delivery to you, you are responsible for the safe delivery of the prisoner into the custody of the Commanding General, Fifth Air Force (Rear), with the least practicable delay.

3. You are authorized to use any legal means of restraint, including handcuffs, to insure that the prisoner does not escape or do physical harm to himself or to others.

4. Any unusual occurrences or undue delays incident to the delivery of the prisoner will be reported by message to this headquarters.

5. When a reasonably firm ETA at Fifth Air Force Headquarters (Rear) has been established, that headquarters will be so notified.

6. Upon completion of delivery of the prisoner into the custody of the Commanding General, Fifth Air Force, you will effect delivery of the letter from the Secretary of the Air Force with 1st Indorsement by Headquarters USAF and 2nd indorsement by this headquarters to the Commanding General, Far Eastern Air Force, Tokyo, Japan.

By command of Lieutenant General Johnson:

(S.) John J. Leonard, Major, USAF, Asst Adjutant General

Certified True Copy, Louis F. Alyea, Lt Col, USAF, Acting Staff Judge Advocate, Continental Air Command.

(Here Follows 1 Photograph, Side Fol. 80)

he was under arrest by direction of the Secretary of the Air Force.

I then read Toth the charges and specifications, the Secretary's letter ordering him apprehended and returned to Korea for trial by court-martial and advised him of his rights under Article 31 of the Uniform Code of Military Justice.

M/Sgt McCreedy then conducted a routine search for concealed weapons on Toth. Nothing was found. Toth did not resist the apprehension or the search. We departed the Jones & Laughlin Steel Corporation Plant at 1610 hours and arrived at Greater Pittsburgh Airport at 1640 in two OSI vehicles. Toth rode in the first vehicle with Captain Jerome, Sgt Menard and Sgt McCreedy. He was immediately taken to the Base Provost Marshal's Office, where Captain Jerome obtained all necessary information for DD Form 578, Incident Report, (copy attached), Inclosure 1, which Toth answered without objection. He signed two copies of form titled, "Uniform Code of Military Justice, Article 31, Compulsory Self-Incrimination Prohibited", (Photostat attached), Inclosure 2.

I again read to Toth the Secretary's letter, the charges and specifications and advised him of his rights under Article 31 of the Uniform Code of Military Justice. When Toth said that he could not understand how he could be returned to Air Force control since he was a civilian, I read Article 3a, Uniform Code of Military Justice to him. After reading Article 3a, I asked him if he would like it explained in simple language and he said no, he completely understood it. I advised him that he would have an opportunity to [fol. 85] telephone his parents and a civilian lawyer if he so desired prior to departure from Pittsburgh. Toth was given a receipt for the personal property he decided to leave behind and which he later requested, by telephone, that his step-father, Mr. Mertz, pick up for him at the Base Provost Marshal's Office. I have a receipt, signed by Mr. Mertz, for this property. Those present during the period at the Provost Marshal's Office were the four Air policemen, Captain Jerome, Captain Bernard B. Keller, Base Provost Marshal, one OSI Agent whose name is unknown, and myself.

At 1715 hours, Toth was taken to the Base Dispensary

RECEIPT FOR PRISONER

CASE NUMBER	DATE
[redacted]	18 May 1953

UNIT	LOCATION	RECORD OF ARREST NUMBER
2500th Air Base Wing	Mitchel AFB, New York	N/A

NAME (Last, first, middle initial)	ARMY SERIAL NUMBER	GRADE	ORGANIZATION
TOTI, Robert W.	Civilian	N/A	N/A

OFFENSE

Article 81 and 113. Charged with premeditated murder. Appronension and return to Headquarters, Fifth Air Force (Rear) directed by the Secretary of the Air Force.

I ACKNOWLEDGE RECEIPT OF THE ABOVE NAMED PRISONER AND CERTIFY THAT I AM AUTHORIZED TO RECEIVE THE PRISONER INTO MY CUSTODY

TIME	SIGNATURE	GRADE	ARMY SERIAL NUMBER
1600 hours	[redacted] Hall, 2nd Lt, USAF, Conf Officer	2nd Lt.	AO 2 219 402

DATE	ORGANIZATION	STATION
18 May 1953	Fifth Air Force Correction Center	K-2 Air Base, APO 970

WD AGO 19-74

where he received a physical examination given by the Flight Surgeon. At this time his clothing was further searched for concealed weapons by Airman Menard. Captain Jerome, Captain Keller, Sgt McCreedy and myself were present during the physical examination. No objection was made by Toth. I received a health certificate from the Flight Surgeon certifying that Toth was physically able to travel by any means.

Toth was returned to the Provost Marshal's Office. For the third time I read the Secretary's letter, the charges and specifications, Article 31 of the Uniform Code of Military Justice and Article 3a of the Uniform Code of Military Justice to Toth. I again asked him if he desired to contact a civilian lawyer, to which he stated he did not and would wait to have Defense Counsel appointed in Korea. Toth was turned over to S/Sgt Mayers and S/Sgt Rodriguez at 1820 hours. Toth messed in the 500th Air Defense Group Mess, Greater Pittsburgh Airport at 1800 hours and ate a hearty meal.

At 1920 hours, Toth telephoned his home from Captain Keller's office. He had been told that he would have a reasonable length of time for a conversation and that the call would not be censored. His mother answered the telephone and he asked to speak to his step-father. He told his step-father he had been arrested at work and was being returned [fol. 86] to Korea under military escort for trial, that he did not want the press to have any knowledge of what happened. He told his step-father to tell his mother not to worry about it and that he would be back in about a week. He completed the telephone call at 1925 hours. I asked Toth if he wished to telephone anyone else and he said no, he did not.

Toth and the military personnel boarded the airplane immediately. After sometime awaiting clearance for take-off at the airport, we were airborne at 2035 hours. I told Toth our destination was Andrews Air Force Base where he would remain until Friday morning. During the flight he slept in a reclining chair. We arrived at Andrews Air Force Base, Washington, D.C. at 2240 hours. Toth was turned over to Chief Warrant Officer Hendricks, Air Police Operations Office of the 1401st Air Police Squadron, at 2250 hours for protective custody.

On the morning of 14 May, I asked Toth if he was comfortable, if he had enough to eat and whether he would like to write any letters. He replied that he was more than comfortable. In fact, he said he was getting better treatment than he received at home, that he had more than enough to eat. He only wrote one letter, which was addressed to his mother. I gave him the stamp for the letter and personally mailed it at the National Airport in Washington, D.C., on 15 May, at 1000 hours in an official Post Office Box. Toth expressed concern that his case might be publicised and that he wouldn't be able to live in Pittsburgh thereafter.

On the morning of 14 May I conferred with the Base Provost Marshal and the Base Commander concerning the issuance of clothing and equipment to Toth and arranged for a complete physical examination and necessary immunizations. At 1300 hours, Toth was taken to the Clothing Sales Store at Andrews Air Force Base and issued a complete uniform allowance, less insignia, under the provisions of paragraph 11e, Air Force Regulation 125-33. Toth was supplied with a Red Cross Kit of toilet articles and shaving [fol. 87] equipment, cigarettes, handerchiefs and reading material at no expense to the government. Toth was then taken to the Base Hospital where he was given a complete physical examination by Captain Douglas C. Morris, Flight Surgeon. Captain Morris furnished me with a certificate certifying that Toth had been examined, that he was found free of communicable diseases, laboratory findings were negative, no evidence of upper respiratory infection and that in his opinion Toth was able to travel by any conveyance deemed necessary. (Photostat attached, Incl. 3.) Toth made no objection to being examined. At the hospital I asked Toth if he would like to see an officer of the Judge Advocate General's Department or a Chaplain and he said no; that his mother would do his praying and the Air Force could take care of the lawyer. Toth was then returned to the Base Guardhouse.

On 15 May, Toth and the military personnel left Andrews Air Force Base by military vehicle at 0730 hours and arrived at Washington National Airport at 0815 hours. Toth was immediately taken to the VIP Waiting Room where he re-

[fol. 81]

HEADQUARTERS

CONTINENTAL AIR COMMAND

Mitchel Air Force Base, New York

LETTER ORDERS: 166 — 12 May 1953

Subject: Temporary Duty Orders

To: Those Concerned

1. The fol-named Off & amn; 2500th AB Gp, this sta WP Pittsburgh, Pa; Washington, DC; Korea o/a 16 May 53 on TDY aprx twenty (20) days to apprehend Robert W Toth and ret him to the CG, Fifth AF (Rear) Korea, DPUO. Upon compl of TDY will ret proper sta. Air Movement Designator NW-US-1D-0248-RF5. AFM 35-6 w/b complied with and imm IAW AFR 160-102 w/b accomplished immed. Degree of Clearance for the pd of this order only-Secret. Tvl by mil or coml acft, coml rail and/or bus authd. TBGAA. CIPAP. TDN 5733500 348-102 P593-02-03-07 S99-999. (BA# 1030) (Auth: 1st Ind, Ltr Hq USAF, AFCPM-2, 30 Apr 53).

Captain Edwin A Jerome A0802757 USAF
M Sgt Charles E McCreedy AF 20203642
A/1C Albert R. Menard AF 6145681

By Command of Lieutenant General Johnson:
(S.) Leonard Giaimo, Capt., USAF, Asst. Adj Gen

Distribution:
10-Ea Off & amn concerned
3-CO, 2500th AB Gp, Mitchel AFB, NY
1-VC
1-BA
1-CO, Hq Sq Sec ConAC, Mitchel AFB, NY

Certified True Copy: Louis F. Alyea, Lt Col, USAF, Acting Staff Judge Advocate, Continental Air Command.

mained until 0930. Accompanied by M/Sgt McCreedy and A/1C Menard and Captain Jerome, he boarded MATS aircraft No. 131602, Flight 74-15 for a non-stop flight to Travis Air Force Base. At this time I turned him over to the control of Captain Jerome.

During the complete time that Toth was in my presence, he offered no resistance by word or action. At no time was force or threat of any nature used against Toth. As I left Toth upon putting him aboard the aircraft at Washington National Airport, he thanked me for the considerate treatment he had received while under my command.

George S. Owen, Major, USAF, AO 570.927

Subscribed and Sworn to Before Me this 29th day of May 1953. Louis F. Alyea, Lt Col., USAF Acting Staff Judge Advocate Continental Air Command.

OFFENSE OR INCIDENT REPORT

CASE NUMBER

HEADQUARTERS: Headquarters, ConAC, Mitchel AFB, New York

LOCATION: Hempstead, New York

TO: Commanding General, Mitchel Air Force Base, New York

DATE: 13 May 1953

1. NAME OF OFFENDER	2. GRADE	3. SERVICE NUMBER	4. ORGANIZATION
Robert W. TOTH (Civilian)	Former A/1C	AF 13313030	Formerly 543d Security Police Sq APO 970, c/o PM San Francisco, Cal.

5. OFFENSE OR INCIDENT (*Specify offense or type of incident*)

Apprehension of subject civilian on orders received from the Secretary of the Air Force.

6. PLACE AND/OR ADDRESS OF INCIDENT

Apprehended at the Police Dept Office of the Jones & Laughlin Steel Corporation, Pittsburgh Works at 3516 2d Ave. Pittsburgh, Pa

7. HOUR: 1600 hours Eastern Daylight Saving Time

8. DATE: 13 May 1953

9. REPORTED BY (*Name, Grade and Service No. if applicable*)	10. ADDRESS	11. TELEPHONE NUMBER
Secretary of the Air Force	Dept of the Air Force, Washington D.C.	

12. COMPLAINT RECEIVED BY/FROM Dept of the Air Force

☒ LETTER ☐ PERSON ☐ TELEPHONE ☐ CIVIL POLICE ☐ SERVICE POLICE

13. BASIS FOR APPREHENSION	14. APPREHENDING AGENCY	15. VOLUNTARY SURRENDER
☒ ON COMPLAINT ☐ ON VIEW	☐ CIVIL POLICE ☒ SERVICE POLICE	☐ CIVIL POLICE ☐ SERVICE POLICE N/A

16. HOW DRESSED (*Civilian or military and condition of clothing*)

Civilian working clothes Race: Caucasian Age: 21 MARRITAL STATUS: Single

17. DETAILS OF OFFENSE OR INCIDENT

Subject is charged with premeditated murder committed while stationed in Korea.

Orders directing his apprehension and subsequent return to Korea were received from the Department of the Air Force per Letter, Dept of the Air Force, Subject: Return of Robert W. Toth (Former A/1C, AF 13313030); Trial by Court Martial dated April 30, 1953 and amendments thereto.

Subject will be returned to Korea by authority contained in Letter Order 166, Hq ConAC dated 12 May 1953. Estimated time of departure from ZI will be e/a 16 May 1953.

Information concerning subject:

Date of Birth: 8 Dec 1931
Home Address: 220 Dunseith Street, Pittsburgh 13, Pennsylvania
Home Phone: Schenley 1-7231

6. PLACE AND/OR ADDRESS OF INCIDENT

Apprehended at the Police Dept Office of the Jones & Laughlin Steel Corporation, Pittsburgh Works at 3516 2d Ave. Pittsburgh, Pa

7. HOUR: 1600 hours Eastern Daylight Saving Time

8. DATE: 13 May 1953

9. REPORTED BY (*Name, Grade and Service No. if applicable*): Secretary of the Air Force

10. ADDRESS: Dept of the Air Force, Washington D.C.

11. TELEPHONE NUMBER

12. COMPLAINT RECEIVED BY/FROM Dept of the Air Force

☒ LETTER ☐ PERSON ☐ TELEPHONE ☐ CIVIL POLICE ☐ SERVICE POLICE

13. BASIS FOR APPREHENSION: ☒ ON COMPLAINT ☐ ON VIEW

14. APPREHENDING AGENCY: ☐ CIVIL POLICE ☒ SERVICE POLICE

15. VOLUNTARY SURRENDER: ☐ CIVIL POLICE ☐ SERVICE POLICE N/A

16. HOW DRESSED (*Civilian or military and condition of clothing*)

Civilian working clothes Race: Caucasian Age: 21 MARRITAL STATUS: Single

17. DETAILS OF OFFENSE OR INCIDENT

Subject is charged with premeditated murder committed while stationed in Korea.

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Information concerning subject:

Date of Birth: 8 Dec 1931
Home Address: 220 Dunseith Street, Pittsburgh 13, Pennsylvania
Home Phone: Schenley 1-7231

Incl 1

DD FORM 1 SEP 51 578 REPLACES WD AGO FORM 19-71, 1 SEP 46, WHICH IS OBSOLETE

[fol. 82] AFFIDAVIT

STATE OF NEW YORK
County of Nassau, ss:

GEORGE S. OWEN, Major, USAF, AO 570 927, having been duly sworn, deposes and says as follows:

I am the Assistant Provost Marshal of Continental Air Command, Mitchel Air Force Base, New York. I received an initial warning on 30 April 1953 by telephone from Colonel Stevenson of the Air Provost Marshal's Office, Headquarters USAF, which revealed that this command would be directed to apprehend a civilian who was a former airman accused of an offense under the Uniform Code of Military Justice. I was directed to start planning for the apprehension and advised that written instructions would be forthcoming from Headquarters USAF.

At 1600 hours, 6 May 1953, the Secretary's letter, charge sheets, and 1st Indorsement to this headquarters from the Department of the Air Force, Headquarters, USAF, signed by Major General Joseph V. Dillon, the Air Provost Marshal, were received. The subject of the Secretary's letter was: Return of Robert W. Toth, (former A/1C, AF 13 313 030); Trial by court-martial. Address was 220 Dunseith Street, Pittsburgh, Pennsylvania.

On 7 May 1953, I was ordered by par 2, Letter Orders 159, Headquarters ConAC, 7 May 1953, to proceed to Pittsburgh, Pennsylvania, for the purpose of planning the apprehension of Robert W. Toth. On 8 May 1953, I contacted Special Agent Park R. McCandless, OSI Detachment Commander in Pittsburgh and with him conferred with Captain Nicholson, Chief of Plant Protection, Jones & Laughlin Steel Corporation, where Toth was employed. It was agreed in conference with the aforementioned persons that Toth would be taken into custody by the plant police and turned over to my control at a time to be determined later. I then returned to this station arriving on 9 May 1953.

[fol. 83] On 11 May 1953, a conference was held with Major General Hall, the Vice Commander of Continental Air Command, Colonel Quirk, Assistant Vice Commander, Colonel Schweikhardt, Staff Judge Advocate, Lt Colonel Alyea,

CHARGE SHEET

PLACE: Hq., 75th Air Depot Wing, APO 970, c/o Postmaster, San Francisco, California

DATE: 24 MAY 1953

ACCUSED (Last Name, First Name, Middle Initial) (Last entry when material.): TOTH, Robert W.

SERVICE NUMBER: AF 13 313 030

RANK OR GRADE: Civilian, formerly Airman First Class

ORGANIZATION AND ARMED FORCE (If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law.): 220 Dunsmith Street, Pittsburgh, Pennsylvania, A civilian subject to the Uniform Code of Military Justice under Article 3a.

DATE OF BIRTH:

CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE (MCM, 126h (2)):

PAY PER MONTH

BASIC $

SEA OR FOREIGN DUTY $

TOTAL $

RECORD OF SERVICE

INITIAL DATE OF CURRENT SERVICE: Honorably Discharged 8 December 1952

TERM OF CURRENT SERVICE:

PRIOR SERVICE (As to each prior period of service, give inclusive dates of service and organization in which serving at termination.):

DATA AS TO WITNESSES

NAME OF WITNESS	ADDRESS	WITNESSES FOR PROSECUTION	WITNESSES FOR ACCUSED
Willard K. Carpenter, A/2C AF 16 410 247	3400th Air Police Squadron, Francis E. Warren Air Force Base, Wyoming	X	
Bobby L. Holcomb, A/2C AF 14 390 964	3629th Student Squadron, Air Base Defense, Parks Air Force Base, California	X	

Willard K. Carpenter, A/2C AF 16 410 247	3400th Air Police Squadron, Francis E. Warren Air Force Base, Wyoming	X	
Bobby L. Holcomb, A/2C AF 14 390 964	3629th Student Squadron, Air Base Defense, Parks Air Force Base, California	X	

DOCUMENTS AND OBJECTS

LIST AND DESCRIBE. IF NOT ATTACHED TO CHARGES, NOTE WHERE IT MAY BE FOUND.

DATA AS TO RESTRAINT

NATURE OF ANY RESTRAINT OF ACCUSED	DATE	LOCATION
Confined	18 May 1953	K-2 Air Base, APO 970

DD FORM 1 MAR 51 458

1 REPLACES DA AGO FORM 115, 1 DEC 48 WHICH IS OBSOLETE

Assistant Staff Judge Advocate, Lt Colonel Royal, Air Provost Marshal, and myself in the Vice Commander's Office, Continental Air Command, at which time the plan for the apprehension was discussed and approved. I then telephoned Special Agent McCandless on 11 May 1953 who confirmed that Toth would be at work on the afternoon of 13 May 1953; that transportation and assistance would be supplied by the OSI and that Captain Nicholson, Chief of Plant Protection, would be apprised of our plans. On the afternoon of 11 May 1953, the final plan for the apprehension of Toth was submitted to the Commanding General and the Vice Commander, Continental Air Command, and was approved.

I left Mitchel Air Force Base by military aircraft at 1030 hours, 13 May 1953, accompanied by Captain Edwin Jerome, M/Sgt Charles McCreedy, S/Sgt Caesar A. Rodriguez, S/Sgt William F. Mayers and A/1C Albert E. Menard. We arrived at Greater Pittsburgh Airport, Pennsylvania at 1335 hours. The Base Provost Marshal, Headquarters 500th Air Defense Group, was advised of our duty, and he provided transportation to the OSI Detachment in Pittsburgh, where we arrived at 1515 hours and conferred with Special Agent McCandless of the OSI Detachment. About five minutes after our arrival, at 1520 hours, Captain Nicholson of the Jones & Laughlin Plant Police, telephoned to say that Toth had been detained at the plant.

Accompanied by the personnel mentioned above plus Special Agent McCandless and 2 other OSI agents, who were unknown to me, we departed for the Jones & Laughlin Steel Plant where Toth was employed. We arrived at 1550 hours at the plant which was located at 3516 Second Avenue, Pittsburgh, Pennsylvania, and were immediately escorted by Lt. M. W. Smith to his office where Toth was being detained by Corporal James T. Mander, Jr.. The lieutenant and [fol. 84] the corporal were plant police. The time was 1600 hours. I was in Air Force uniform and immediately identified myself to Toth as a Major in the United States Air Force. I asked Toth his name and former Air Force Serial Number. He said, "I am Robert W. Toth", and gave his correct serial number. Lt. Smith and Corporal Mander were present, plus one unknown OSI Agent, M/Sgt McCreedy, Sgt Menard, Toth and myself. I immediately told Toth

NAMES OF INDIVIDUALS REQUIRING MEDICAL ATTENTION (Attach medical reports, if prepared)

17 1/2 cs

Routine physical exam; see attached report

19. NAME, ADDRESS, AND TELEPHONE NUMBER OF DOCTOR OR OTHERS RENDERING FIRST AID

N/A

20. WITNESSES (Attach copy of statements given by witnesses)

NAME	ADDRESS	TELEPHONE
Lt. M.W. Smith Plant Police	J & L Pittsburgh Works 2707 Carson St. Pittsburgh, Pa	
Cpl James T. Mander	J & L Pittsburgh Works 2707 Carson St. Pittsburgh, Pa	

21. APPREHENDING PERSONNEL

NAME	GRADE	SERVICE NUMBER	ORGANIZATION
G.S. Owen	Major	AO 570927	Hq, ConAC
Charles E. McCreedy	M/Sgt	AF 20203642	2500th Air Police Sq
Albert R. Menard	A/1C	AF 6145681	2500th Air Police Sq

22. EVIDENCE

None; Personal Property Receipt attached.

Cpl James T. Mander	J & L Pittsburgh Works 2707 Carson St. Pittsburgh, Pa	

21. APPREHENDING PERSONNEL

NAME	GRADE	SERVICE NUMBER	ORGANIZATION
G.S. Owen	Major	AO 570927	Hq, ConAC
Charles E. McCreedy	M/Sgt	AF 20203642	2500th Air Police Sq
Albert R. Menard	A/1C	AF 6145681	2500th Air Police Sq

22. EVIDENCE

None; Personal Property Receipt attached.

23. DISPOSITION OF EVIDENCE

N/A Personal property to accompany prisoner.

24. DISPOSITION OF OFFENDER

To be returned to CG, Fifth Air Force (Rear) Korea

TYPED NAME, GRADE, AND ORGANIZATION OF COMMANDING OFFICER	SIGNATURE
GEORGE S. OWEN, Major, Hq, ConAC	George S. Owen

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☆ U.S. GOVERNMENT PRINTING OFFICE 1951 O—887189

Encl 1

UNIFORM CODE OF MILITARY JUST

Article 31. Compulsory self-incrimination prohibited.

(a) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense, without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

STATEMENT

Sections (a) and (b) of Article 31 of the Uniform Code of Military Justice have been read and explained to me, and I fully realize and understand the contents thereof and my rights thereunder.

~~I have been AWOL without leave from my organization~~ _____
_____ at _____
(Organization) (Post, Camp, or Station)
~~since on or about~~ _____ 195__.

This ~~statement~~ is made by me voluntarily and I have full knowledge that it may be used ~~against me~~. I understand and realize that impersonating a member of the Military Service is punishable under Federal Law.

13 May 52 1600 Robt W. Tatk
Date Time Signature of EM, WO or Officer

STATEMENT

Sections (a) and (b) of Article 31 of the Uniform Code of Military Justice have been read and explained to me, and I fully realize and understand the contents thereof and my rights thereunder.

~~I have been AWOL without leave from my organization~~ _____
_____ at _____
(Organization) (Post, Camp, or Station)
~~since on or about~~ _____ 195__.

This ~~statement~~ is made by me voluntarily and I have full knowledge that it may be used ~~against me~~. I understand and realize that impersonating a member of the Military Service is punishable under Federal Law.

13 May 52 1600 Robt W. Tatk
Date Time Signature of EM, WO or Officer

_____
Rank, Service No. and Arm or Sv.

Sections (a) and (b) of Article 31 of the Uniform Code of Military Justice were read and explained to the enlisted man, Warrant Officer or Officer, whose signature appears above, and his signature witnessed.

[illegible]
Name of Witness

M/Sgt. AF 23803642 USAF
Rank, Service No. and Arm or Sv.

250th Air Police Sq
Organization

[illegible]
Name of Person Reading and Explaining Article 31

[illegible] AF19927 USAF
Rank, Service No. and Arm or Sv.

[illegible]
Organization

ADDITIONAL CHARGE

Charge : Violation of the Uniform Code of Military Justice, Article [redacted]

Specification : In that Robert W. Toth, a civilian subject to the Uniform Code of Military Justice under Article 2a, then an Airman First Class, United States Air Force, assigned to the 5434 Ammunition Supply Squadron Depot, 79th Air Depot Wing, APO 970, did at or near K-9 Air Base, APO 970, on or about 27 September 1952, commit an assault upon Bang Soon Kil, a male Korean national, by striking him on the head and face with a pistol and did thereby intentionally inflict grievous bodily harm upon him, to wit: a deep cut.

If this space is insufficient for all charges and specifications, they will be set forth numerically, front to back, on separate sheets attached to this page.

[redacted]

SIGNATURE OF ACCUSER	RANK	ORGANIZATION
[redacted]	Colonel, USAF	Hq 79th Air Depot Wing

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 24th day of May, 19 53, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

Ben Taylor
SIGNATURE

Lt Colonel, USAF, Hq 79th Air Depot Wing
RANK AND ORGANIZATION OF OFFICER ADMINISTERING OATH

[redacted]
OFFICIAL CHARACTER, AS ADJUTANT, SUMMARY COURT, ETC. SEE PARAGRAPH 29e, MCM, 1951, AND ARTICLES 30a AND 136.

Officer administering oath must be a commissioned officer.

24 May 1953
DATE

I have this date informed the accused of the charges against him.

Warren White — 2d Lt 6157th Air Base Sqd (CC)
SIGNATURE — RANK AND ORGANIZATION

Headquarters, 79th Air Depot Wing, APO 970, c/o PM, San Francisco, Calif. 24 May 1953
DESIGNATION OF COMMAND OF OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION — PLACE — DATE

The sworn charges above were received at 1300 hours, this date.

FOR THE COMMANDING [illegible]
Ben Taylor
[redacted], Lt Col, USAF, Adjutant
SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

1ST INDORSEMENT

I have this date informed the accused of the charges against him.

Warren White — 2d Lt 6157th Air Base Sqd (CC)
SIGNATURE — RANK AND ORGANIZATION

Headquarters, 79th Air Depot Wing, APO 970, c/o PM, San Francisco, Calif. 24 May 1953
DESIGNATION OF COMMAND OF OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION — PLACE — DATE

The sworn charges above were received at 1300 hours, this date.

FOR THE COMMANDING [illegible]
Ben Taylor
[redacted], Lt Col, USAF, Adjutant
SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

1ST INDORSEMENT

DESIGNATION OF COMMAND OF CONVENING AUTHORITY — PLACE — DATE

Referred for trial to the _____ court-martial appointed by _____

_____, _____, 19___, subject to the following instructions: [2] _____.

BY [1] _____ of _____
COMMAND OR ORDER

SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

I have served a copy hereof on each of the above-named accused, this _____ day of _____, 19___.

SIGNATURE — RANK AND ORGANIZATION OF TRIAL COUNSEL

[1] When an appropriate commander signs personally, inapplicable words are stricken out. [2] Relative to proper instructions which may be included in the indorsement of reference for trial, see par. 33j(1), MCM, 1951. If none, so state.

87

OFFICE OF THE FLIGHT SURGEON
ANDREWS AIR FORCE BASE
WASHINGTON 25, D. C.

14 May 1953

C E R T I F I C A T E

This is to certify that ROBERT W. TOTH was examined by the undersigned this date and found free of communicable disease. Laboratory findings are negative. No evidence of upper respiratory infection. In my opinion the patient is able to travel by any conveyance deamed necessary.

Douglas C. Morris

DOUGLAS C. MORRIS
CAPTAIN, USAF MC
FLIGHT SURGEON

Fill in blank with numbers of pertinent charges and specifications or "all specifications and charges," as may be appropriate. For use unless departmental regulations prevent such election.

THE ACCUSED HAS BEEN PERMITTED AND HAS ELECTED TO REFUSE PUNISHMENT UNDER ARTICLE 15 AS TO

RANK AND ORGANIZATION OF OFFICER EXERCISING JURISDICTION UNDER ARTICLE 15	SIGNATURE

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL	CASE NO.. *(Inserted by convening authority)*

TO BE FILLED IN BY THE ACCUSED

1 ☐ CONSENT ☐ OBJECT TO TRIAL BY SUMMARY COURT-MARTIAL	SIGNATURE OF ACCUSED

TO BE FILLED IN BY SUMMARY COURT IF APPLICABLE

When an accused has been permitted and has elected to refuse punishment under Article 15, trial by summary court-martial may proceed despite his objection.

1. THE ACCUSED, HAVING REFUSED TO CONSENT IN WRITING TO TRIAL BY SUMMARY COURT-MARTIAL AND NOT HAVING BEEN PERMITTED TO REFUSE PUNISHMENT UNDER ARTICLE 15, THE CHARGES ARE HEREWITH RETURNED TO THE CONVENING AUTHORITY.

RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

2. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79d, MCM, 1951? ☐ YES

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS
			NUMBER OF PRIOR CONVICTIONS CONSIDERED
PLACE			DATE

RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

2. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79d, MCM, 1951? ☐ YES

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS
			NUMBER OF PRIOR CONVICTIONS CONSIDERED
PLACE			DATE

RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

Enter after signature, "Only officer present with command," if such is the case.

TO BE FILLED IN BY CONVENING AUTHORITY

ORGANIZATION	PLACE	DATE

ACTION OF CONVENING AUTHORITY

RANK AND ORGANIZATION OF CONVENING AUTHORITY	SIGNATURE , COMMANDING

ENTERED ON APPROPRIATE PERSONNEL RECORDS IN CASE OF CONVICTION.

RANK AND DESIGNATION OF OFFICER RESPONSIBLE FOR THE ACCUSED'S RECORDS	SIGNATURE

NOTE: Summary of evidence, if required by the convening or higher authority, will be attached on

*U. S. GOVERNMENT PRI

H.C.68-53

United States of America

FILED
JUN 25 1953
HARRY M. HULL, Clerk

DEPARTMENT OF THE AIR FORCE

Washington, D.C. 19 June , 19[illegible] 53
(Place) (Date)

I HEREBY CERTIFY that the attached are photostatic copies of duplicate originals of the following: affidavit of Brigadier General Bert K. Johnson, Staff Judge Advocate, Far East Air Forces, dated 13 June 1953; electrical communication from the Secretary of the Air Force to Mr. Anthony H. McGrath, Room 417, Fukuhn Building, Tokyo, Japan, dated 18 June 1953; letter from Mr. Anthony H. McGrath to the Secretary of the Air Force, dated 11 June 1953; and electrical communication from Commanding General, Far East Air Forces, to Headquarters, United States Air Force, dated 13 June 1953. Duplicate originals of the attached copies are on file in the Office of The Judge Advocate General, USAF.

/s/ Albert M. Kuhfeld

ALBERT M. KUHFELD
Brigadier General, USAF
Acting The Judge Advocate General, USAF

I HEREBY CERTIFY that Brigadier General Albert M. Kuhfeld , who

[illegible]

[illegible]

Washington, D.C. 19 June , 19[illegible] 53
(Place) (Date)

I HEREBY CERTIFY that the attached are photostatic copies of duplicate originals of the following: affidavit of Brigadier General Bert K. Johnson, Staff Judge Advocate, Far East Air Forces, dated 13 June 1953; electrical communication from the Secretary of the Air Force to Mr. Anthony H. McGrath, Room 417, Fukuhn Building, Tokyo, Japan, dated 18 June 1953; letter from Mr. Anthony H. McGrath to the Secretary of the Air Force, dated 11 June 1953; and electrical communication from Commanding General, Far East Air Forces, to Headquarters, United States Air Force, dated 13 June 1953. Duplicate originals of the attached copies are on file in the Office of The Judge Advocate General, USAF.

/s/ Albert M. Kuhfeld

ALBERT M. KUHFELD
Brigadier General, USAF
Acting The Judge Advocate General, USAF

I HEREBY CERTIFY that Brigadier General Albert M. Kuhfeld , who signed the foregoing certificate, is the Acting The Judge Advocate General, United States Air Force , and that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, HAROLD K. TALBOTT,
Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the City of Washington, this 19th day of June, 19[illegible] 53

(seal)

Harold K. Talbott
Secretary of the Air Force

By Philip J. Carroll
Administrative Assistant

AF FORM 44 COPY WF-O-12 [illegible] 30M

ROUTING

JOINT MESSAGEFORM

COMMUNICATIONS CENTER NO. CJA

SPACE ABOVE FOR COMMUNICATIONS CENTER ONLY

FROM: (Originator)

HQ USAF

DATE-TIME GROUP: 18 JUN 1953

SECURITY CLASSIFICATION: UNCLASSIFIED

PRECEDENCE FOR: ACTION: PRIORITY | INFORMATION: PRIORITY

BOOK MESSAGE ☐ ORIGINAL MESSAGE

MULTIPLE ADDRESS ☐ CRYPTOPRECAUTION YES ☐ NO ☐

REFERS TO MESSAGE

IDENTIFICATION | CLASSIFICATION

TO: Mr. Anthony R. McGrath
Room 417, Feinstein Building
Tokyo, Japan

INFO: Staff Judge Advocate
FEAF TOKYO JAPAN

44962

In reply to your letter and cable of 11 June 1953, you are advised that proper administration of military justice requires that the Toth case, if referred for trial under Article 34 of the Uniform Code of Military Justice, be tried in Korea. Brigadier General Johnson, Staff Judge Advocate, FEAF, has advised that ample qualified and competent counsel are available in the Far East Air Forces for appointment as defense counsel. Johnson advised you that in the event the accused desires military counsel other than those

proper administration of military justice requires that the Toth case, if referred for trial under Article 34 of the Uniform Code of Military Justice, be tried in Korea. Brigadier General Johnson, Staff Judge Advocate, FEAF, has advised that ample qualified and competent counsel are available in the Far East Air Forces for appointment as defense counsel. Johnson advised you

that in the event the accused desires military counsel other than those heretofor appointed he may make request therefor as provided by the Manual for Courts-Martial, United States, 1951. The Air Force facilitated your departure for Tokyo and made possible your travel between Tokyo and Korea on the basis of understanding you were going to represent accused. In the event you represent accused in the trial, the appointed defense counsel and assistant defense counsel will be available to act as associate counsel if accused desires.

This message directed by the Office of The Secretary of the Air Force.

HAROLD E. TALBOTT
SECRETARY OF THE AIR FORCE

AFCJA-22 Col Ward | AFCJA-20 Brig Gen Kuhfeld | OSAF Col W.G. Hipps

SECURITY CLASSIFICATION: UNCLASSIFIED | PAGE 1 OF 1 PAGES

DRAFTER'S NAME (and signature, when required)
CHESTER W. WELSOE, LT COL, USAF

RELEASING OFFICER'S SIGNATURE

SYMBOL: AFCJA-22 | TELEPHONE: 57753

OFFICIAL TITLE: Brig Gen USAF
The A. st JAG, USAF

DD FORM 1 OCT 49 173 REPLACES NME FORM 173, 1 MAY 48. WHICH MAY BE USED. GOVERNMENT PRINTING OFFICE

[fol. 98] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 150

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH, Petitioner,

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.